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JURISDICTIONAL STATEMENT

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1963

Case No. 931

LYNCHBURG TRAFFIC BUREAU (CORP.)
Appellant,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION
Appellees.

Appeal from the District Court of Three Judges for the Western District of Virginia to the Supreme Court of the United States.

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UNITED STATES OF AMERICA and
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Appeal from the District Court of Three Judges for the Western District of Virginia to the Supreme Court of the United States.

BRIEF FOR THE APPELLANT

STATEMENT

This is a direct appeal under 28 U.S.C. 1253 from a decision of a three-Judge District Court to the Supreme Court of the United States.

A final order was entered on November 21, 1963, and the order denying motion of plaintiff for reconsideration was entered on December 31, 1963. Notice of Appeal was filed December 20, 1963, and an order was entered on January 16, 1964 enlarging the present period by 30 days

in which to file the record with this Court and for plaintiff to complete the appeal. This decision of the Court is reported at ..... Fed Sup. ..... a copy of which is attached as Appendix A, and of the Commission reported at ..... I.C.C. ..... a copy of which is attached as Appendix B.

THE QUESTIONS PRESENTED

The questions presented are:

(1) Is it proper and consistent with statutory provisions and not arbitrary and capricious for the Interstate Commerce Commission to use a different yardstick in measuring the reasonableness and lawfulness of rates and charges on fine coal to Lynchburg, an intermediate point to Danville, than the yardstick the Commission used in measuring the reasonableness and lawfulness of rates and charges on fine coal to Danville, the more distant point;

(2) Is it proper and consistent with statutory provisions and not arbitrary and capricious for the Interstate Commerce Commission to sanction and allow the establishment on fine coal of rates and charges, which rates and charges disrupt a relationship in rates between Lynchburg and Danville that the defendant carriers first established some 60 years ago and which rate relationship has been for over 60 years confirmed, fixed, and required to be maintained by the Interstate Commerce Commission; and

(3) Is it proper and consistent with statutory provisions and not arbitrary nor capricious for the Interstate Commerce Commission to sanction the maintenance of rates and charges on fine coal at Danville which tends to destroy Lynchburg and to build up Danville at the expense of

Lynchburg; i.e., the same rates at Lynchburg and Danville when there should lawfully be 50 cents a ton difference in the rates between the two points.

HISTORY

A review of the history of the rates on coal to Lynchburg and Danville will clearly demonstrate the fact that the decisions of the Court and of the Commission are erroneous in fact and law, as there is no basis in law or fact to justify the same rates on coal at Lynchburg and Danville.

The history of the rates on coal to Lynchburg and Danville is found in decisions of the Commission dating back more than 60 years. Those decisions will show that the Commission has always, prior to its decision in this case, prescribed a lower rate on coal to Lynchburg than it prescribed to Danville. The difference has not been less than 40 cents a ton nor more than 70 cents a ton lower to Lynchburg than to Danville and these facts point up the errors found in the decisions of the District Court and of the Commission.

In *City of Danville* v. *Southern Railway*, 8 I.C.C. 409, decided in 1900, the Commission, on the complaint of Danville alleging discrimination against Danville and preference to Lynchburg, found the discrimination and preference to exist, but the order of the Commission was set aside because the defendant, Southern Railway, could not alone remove the preference and discrimination (See *Interstate Commerce Commission* v. *Southern Railway*, 117 Federal 741).

In *City of Danville* v. *Southern Railway Company*, 34

I.C.C. 430, decided in 1915, on allegation that rates to Danville were unreasonable and unjustly discriminatory in that they unduly prefer Lynchburg, Richmond, and Roanoke, the Commission prescribed a reasonable rate on coal of 210 cents a ton from the Pocahontas group to Danville, Virginia, for distance of 271 miles via Lynchburg. In reaching the conclusion that the rate of 220 cents to Danville was unlawful, that rate was compared with the rate of 150 cents a ton to Lynchburg. The existence of a rate relationship between Danville and Lynchburg was recognized by the Commission in *City of Danville* v. *Southern Railway*, 34 I.C.C. 430, where the Commission stated, in 1915, the relationship in rates between Lynchburg and Danville as follows:

> "The rates to points on the Southern Railway south of Lynchburg are blanketed; $2 to stations within 40 miles of Lynchburg and $2.20 to stations farther distant to and including Danville (441)."

The rate relationship between Danville and Lynchburg was actually fixed in 1915 at 60 in favor of Lynchburg (210 against 150) and the report (34 I.C.C. 430) shows the existence of the rate relationship.

In Bituminous Coal Rates to the Southeast, 37 I.C.C. 652, decided December 31, 1916, the Commission prescribed a rate on bituminous coal from Pocahontas group to Lynchburg of 140 cents a ton for distance of 205 miles. In the Bituminous Coal Rates to the Southeast supra, the Commission fixed a relationship between all mines in West Virginia, Kentucky, Virginia, and Tennessee to all points in Carolina Territory including Danville and in that same

decision prescribed a rate of 140 cents a ton to Lynchburg and left in effect the Danville rate of 210 cents a ton, thus making the rate relationship 70 cents per ton between Danville and Lynchburg.

In *Danville Chamber of Commerce* v. *Southern Railway*, 191 I.C.C. 20, the Commission, on January 30, 1933, prescribed a rate of 255 cents a ton from the Pocahontas group to Danville for distance of 271 miles via Lynchburg.

In *State Corporation Commission of Virginia* v. *N. & W. Railway*, 190 I.C.C. 325, decided December 19, 1932, and *Staunton Brick Company* v. *C. & O. Railway*, 190 I.C.C. 302, decided December 19, 1932, the Commission prescribed a rate of 215 cents a ton from Pocahontas-New River District to Lynchburg, Virginia. The rate relationship was fixed in 1933 at 40 cents a ton between Danville and Lynchburg.

In *Ashland Coal and Ice* v. *A.C.L.*, 256 I.C.C. 429, decided November, 1943, the Commission prescribed a rate of 205 cents a ton to Lynchburg. The rate relationship was again made 50 cents a ton between Danville and Lynchburg.

In *Carolina Coal Consumers Conference* v. *A. & R.*, 270 I.C.C. 291, decided in 1948, the Commission again fixed the rate to Danville at 255 cents. The rate relationship was again made 50 cents a ton between Danville and Lynchburg and that rate relationship remained in effect until 1954 when defendant carriers made the first reduction in the rate relationship by reducing the rate 30 cents a ton, by 35 cents a ton and by 10 cents a ton and the failure to reduce the rate to Lynchburg accordingly results in an unlawful destruction of a prescribed rate relationship.

COMPLAINT

Plaintiff filed with the Interstate Commerce Commission on July 21, 1961, a formal complaint against the rail rates on coal moving in carloads from Pocahontas-New River groups to Lynchburg, Virginia. The bituminous coal involved in this complaint is described in the tariffs as:

> "Coal which will pass through a bar screen not exceeding one and one-half inches between bars, or its equivalent, a two-inch mesh or two-inch round perforation."

and it will be called hereinafter "fine coal."

It was alleged in the complaint that the assailed rates on fine coal to Lynchburg, Virginia, were unjust, unreasonable, and discriminatory in violation of Sections 1, 2, 3, and 4 of the Act. The cause for the complaint was the several reductions made in the rate on fine coal to Danville resulting in higher rates at Lynchburg than at Danville and the maintenance of the same rates at Lynchburg and Danville, contrary to decisions of the Interstate Commerce Commission dating back to 1900 in which higher rates on coal were prescribed to Danville than to Lynchburg. These decisions thus established as a fact and in law, that higher rates at Lynchburg than at Danville or the same rates at Lynchburg as at Danville are unlawful at Lynchburg to the extent the rate to Lynchburg is not at least 50 cents a ton lower than the rate to Danville.

It is the contention of plaintiff that since the Interstate Commerce Commission has for over 45 years prescribed on coal moving from the Pocahontas and New River groups

to Danville, a higher rate to Danville than the rates the Interstate Commerce Commission has prescribed on the same coal moving to Lynchburg, that the same rate to Lynchburg as to Danville or a higher rate at Lynchburg than at Danville is a rate to Lynchburg that is, as a matter of law, unreasonable and otherwise unlawful in violation of the Interstate Commerce Act.

The decision of the Commission in this proceeding holding that the Danville rate, when applied at Lynchburg, is not unjust or unreasonable at Lynchburg, is arbitrary, capricious, an abuse of discretion, not in accordance with law and unsupported by substantial evidence and the decision of the District Court sustaining the Commission is also contrary to law on the same grounds assigned to the decision of the Commission. The proof of these facts is found in decisions of the Commission beginning in 1900, holding that Lynchburg is lawfully entitled to a lower rate on coal than Danville, Virginia. The Commission, in those decisions, has fixed the difference to be on an average of 50 cents a ton lower to Lynchburg than to Danville and that relationship is required to be maintained at Lynchburg to meet the requirements of the Act and the decisions of the Commission. The decision of the District Court in dismissing the complaint is contrary to law and the facts of record as it disregards completely the decisions of the Commission, the evidence of record, not in keeping with applicable law and is contrary to decisions of the Courts.

DISCRIMINATION

The alleged discrimination between Lynchburg and Danville exists as a matter of fact and law based on decisions

of the Commission finding the discrimination existing which the Courts have affirmed.

The complaint alleged unjust discrimination and undue preference and in response thereto, the Commission said:

> "The record fails to show that any new industry has refused to locate at Lynchburg, or that any industry has left that City because of the assailed rate situation, or that any industry was induced thereby to locate at other points named."

This standard of measurement does not overlook the existence of discrimination but it seeks to evade the removal of it.

The District Court for the Northern District of California, Northern Division, in opinion in Civil No. 8471 rendered February 7, 1964 in *Stanislaus County et al* v. *United States of America* and *Interstate Commerce Commission*, answers that contention of the Commission as follows:

> "Industry in Stanislaus County may well have grown at an even faster rate had it not been for the rate disparity. We cannot say that the Commission could reasonably conclude from the evidence that plaintiffs had not shown injury. Accordingly, we must set aside the Commission's finding that plaintiffs had failed to establish injury."

There was no evidence introduced by defendant carriers that the rate situation "was not the cause for the smaller growth of Lynchburg." In fact, the period of time in

which the rate situation had been in effect was hardly sufficient time to prove actual pecuniary damage, but the time the rate situation had been in effect was sufficient to show what the rate situation was doing and that it would continue to do irreparable damages to Lynchburg. It was plain unadulterated unjust discrimination and undue preference when the legal rate relationship was destroyed regardless of the cause. This is true as the evidence shows that the Commission, for over 60 years, had in several decisions prescribed a different rate to Danville from the rate it prescribed to Lynchburg and that prescribed difference was 50 cents a ton in favor of Lynchburg when the reduction to Danville was first made. The *prescribed difference* in rates to Danville and Lynchburg has never been less than 40 nor more than 70 cents subsequent to the year 1900.

The existence of actual competition between Lynchburg and Danville was recognized by the Commission in 1900 in *City of Danville* v. *Southern Railway*, 8 I.C.C. 409 and in that report, the Commission, at page 441, said:

> "The complaint alleges that the defendants by maintaining these rates not only violates the Fourth, but also the Third Section of the Act, in that it creates and continues an unjust discrimination against Danville as compared with Lynchburg. We have found that the discrimination exists. We have found that it is without justification. It is, therefore, an unjust discrimination under the Third Section, which must be prohibited."

The Commission sought to enforce its order in the Courts and the discrimination between Danville and Lynchburg was found by the Court to exist in *Interstate Com-*

merce Commission v. *Southern Railway*, 117 Fed. 741, appld. 122 Fed 800, app. dism. 195 U.S. 639, as the Court said:

> "The evidence in this case leaves no room for doubt that the competition at Lynchburg (as well as Richmond) is real and substantial."

The Danville people, in 1915, complained to the Commission that a rate of $2.20 per ton to Danville in comparison with a rate of $1.50 a ton to Lynchburg and other points from the Pocahontas base group results in unlawful rates at Danville. In *City of Danville* v. *Southern Railway*, 34 I.C.C. 430, the Commission composed the Danville and Lynchburg rates and, at page 441, said:

> "Bluefield, West Virginia, a point 160 miles west of Lynchburg, is the assembly point from the Pocahontas, Clinch Valley and Tug River Districts, from which the rates are $1.50 to Lynchburg and $2.20 per ton to Danville."

The Commission prescribed a rate of $2.10 per ton as a reasonable, just and otherwise lawful rate at Danville and the rate remained $1.50 to Lynchburg.

It was reversible error for the Commission and the District Court to hold that no violation of Section Three of the Act existed as the record shows the existence of the competition and the Commission, in 1900, found the rates then in effect to be an unjust discrimination and fixed a reasonable and just rate relationship between Lynchburg and Danville which would remove the discrimination and

establish a lawful level of rates on coal between the two points.

UNREASONABLE RATES

In 1900, the rate on coal was higher at Danville than at Lynchburg from the origin points here considered. However, Danville sought more reasonable rates in *City of Danville* v. *Southern Railway*, 8 I.C.C. 409, and again sought more reasonable rates in 1915 when the rate was 220 cents a ton to Danville and to Lynchburg, 150 cents a ton. In *City of Danville* v. *Southern Railway*, 34 I.C.C. 430, it was alleged in 1915 that the present adjustment of rates between Danville and points in the west, east, and south is unreasonable in and of itself, unjustly discriminatory in that it unduly prefers Lynchburg, Richmond, and Roanoke and that the rates on coal from the Pocahontas and other West Virginia fields to Danville were specifically challenged as being both unreasonable and unjustly discriminatory.

The Commission on those allegations reduced the rate to Danville from 220 cents per ton to 210 cents to satisfy the undue preference and the unreasonableness of the rates between Lynchburg and Danville and in so doing, fixed then a rate relationship of 60 cents a ton in favor of Lynchburg.

The cases in which difference rates to Lynchburg and Danville have been prescribed are *Staunton Brick Co.* v. *C & O Railway*, 190 I.C.C. 302; *Virginia State Corporation Commission* v. *N & W Railway*, 190 I.C.C. 325; *Danville Chamber of Commerce* v. *C & O Railway*, 191 I.C.C. 20; *A. S. Nowlin and Company* v. *C & O Railway*, 213 I.C.C.

101; *Ashland Coal and Ice Company* v. *A.C.L.*, 256 I.C.C. 429; and *Carolina Coal Consumers Conference* v. *A & R*, 270 I.C.C. 291.

In each of these decisions, the Commission has prescribed higher rates to Danville than those prescribed to Lynchburg and the reason for the difference in rates is found in *Carolina Coal Consumers Conference* v. *A & R*, 270 I.C.C. 291, where the Commission, at page 318, said:

> "Upon consideration of the traffic and transportation conditions in the respective areas (which includes Lynchburg) and of the needs of shippers and consumers concerned, as well as the revenue needs of the carriers, we are convinced that the difference in the rate levels referred to (including the rate level to Lynchburg, page 318) is too great and that a reduction in the assailed rates generally to the eastern and western portions of the Carolinas; to Augusta area, and to Danville and Riddle, is warranted."

These decisions of the Commission clearly demonstrate that the Commission erred as did the District Court in holding that the rate is not unreasonable at Lynchburg. The record shows that the rate on fine coal to Lynchburg is unlawful as a matter of fact and law to the extent that the rate to Lynchburg is not less than the rate to Danville by 53 cent a ton.

In other words, how can the rate to Danville be not unreasonable at Lynchburg when the Commission has, for over 60 years, always prescribed lower rates to Lynchburg than to Danville. The rate to Danville, as a matter of law,

is unjust and unreasonable at Lynchburg and in positive violation of Section 3 of the Act.

NO COMPETITION BETWEEN COAL AND NATURAL GAS EXISTED AT DANVILLE

The report of the Commission in this proceeding shows that the reduction of 30 cents a ton to Danville made on April 8, 1954, was not made to meet competition between coal and other fuels at Danville nor was that reduction made to meet any competition at Danville. The report of the Commission shows that defendant carriers testified as to competition at Danville as follows:

> "The defendants testified that early in 1954, the carriers serving destinations in North Carolina and South Carolina ascertained that certain consumers particularly electric utility and other industries, were either substituting or threatening to substitute natural gas in lieu of fine coal and that there had been decline in rail movements of fine coal to such consumers. Thereupon, they reduced the rates on such coal by 35 cents. The reduction took effect on April 8, 1954, and on the same date the reduced level was established as maximum at intermediate points in southern Virginia to avoid violations of Section 4 of the Act. By the latter action, the rate from the base group to Danville, previously $3.98 on lump and fine coal, was reduced on fine coal to $3.68. At that time the rate to Lynchburg was $3.45, and that rate was continued in effect." (See Lynchburg Traffic Bureau v. C & O ..... I.C.C.) Appendix B, p. 40.

There is absolutely no evidence in the record to support

the decision of the Commission that the reduction to Danville of 30 cents a ton was compelled by competition at Danville between fine coal and natural gas or for any other competitive reason.

The second reduction made in 1958 of 35 cents a ton at Danville was not made to meet gas competition, as the report of the Commission shows:

> "The reduction then made met natural gas competition (in North and South Carolina) until 1958. Due to authorized general increase during the intervening period, aggregating 30 cents a ton, the carriers were again faced with the same situation as in 1954, and, on July 10, 1958, a further reduction of 35 cents was made to all points in North and South Carolina. Higher rates were maintained at intermediate points under authority of Fourth Section Order No. 18957 of July 9, 1958, until September 16, 1958, when the Southern, from origins on the Interstate Railroad reduced the rates to Danville and other destinations in southern Virginia by 35 cents from mines on the Southern and $1 from mines on the Interstate. THIS COMPELLED A REDUCTION ON OCTOBER 20, 1958, OF 35 CENTS FROM THE BASE GROUP TO DANVILLE and other destinations in southern Virginia. Later, effective April 29, 1959, all of the carriers established a further reduction of 10 cents to all points in southern Virginia, North Carolina, and South Carolina." (Emphasis added. See Lynchburg Traffic Bureau v. C. & O. Ry.) Appendix B, p. 41.

The above quotation from the report of the Commission

clearly shows that the entire reduction to Danville of 75 cents a ton was definitely not made to meet competition with other fuels at Danville. Furthermore, the Commission erred in considering the remarks of defendant carriers as to competition at Danville with natural gas, when in the words of defendant carriers, the reduction was not made to meet competition with gas at Danville as shown in the above quotation. The first reduction of 30 cents was made by holding the rate to a more distant point in North Carolina as the maximum rate at Danville. The second reduction to Danville of 35 cents was made because the Southern Railway reduced the rate to Danville by 35 cents from southwestern Virginia mines on the Southern Railway and the third reduction of 10 cents was made without any justification.

The report of the Commission is contrary to the evidence of record in that the record shows no competition at Danville between fine coal and natural gas and the report shows the following:

> "Although the prescribed maximum rates are now maintained on lump coal, the record shows that the defendants were and ARE FACED WITH COMPETITION AS BETWEEN FINE COAL AND NATURAL GAS, and for that reason, rates below the maximum prescribed or authorized by the Commission have been established on fine coal to various points in the south including Danville."

The record is absolutely void of any evidence showing that the reduction in the rate on fine coal was caused by any competition at Danville between fine coal and natural gas. Hence, the report of the Commission is contrary to

the facts of record and the report and order are not supported by substantial evidence.

RELATIONSHIP

It has already been pointed out that plaintiff before the Commission asserted that the rates on fine coal to Lynchburg are unlawful as a matter of law. The relationship in the rates between Danville and Lynchburg, which the Commission fixed, is 50 cents a ton less to Lynchburg than to Danville. The report of the Commission shows:

> "While the Lynchburg rate and the distance for which it applied were considered by the Commission in prescribing the rate to Danville, no specific relationship between bituminous coal rates to Lynchburg and to Danville was prescribed or required by the Commission in the Carolina Coal Consumers Case, supra, nor has any specific relationship in the rates on either fine or lump coal to Lynchburg and Danville been prescribed in any other proceeding. We conclude that the complaint has failed to show the assailed rates are unjust and unreasonable in violation of Section 1 of the Act." (See Lynchburg Traffic Bureau v. C & O Railway, Appendix B, p. 44.

The various decisions of the Commission disclose that the Commission has since 1915, and perhaps earlier than that date, prescribed a higher rate on coal to Danville than it prescribed to Lynchburg and the difference in rates prescribed or that voluntarily maintained by defendant

carriers has been 50 cents a ton for many years. In fact, a rate relationship existed in the rates on coal between Lynchburg and Danville, contrary to the report of the Commission and that relationship is actually shown in a decision of the Commission. In *A. S. Nowlin & Company* v. *C & O Railway*, 213 I.C.C. 101, when the Commission, at page 113, said:

> "To all points south of Lynchburg to and including Danville, there has been a parity of rates from all three groups of origin. From the base group of the Pocahontas carriers to Lynchburg and points south to and including Altavista, the rate was $2.39 prior to March 18, 1933, and $2.15 thereafter to points south of Altavista to and including Danville, the rate was $2.89 prior to April 10, 1933, and $2.55 thereafter."

The rate relationship was actually in existence in 1915 between Lynchburg and Danville as shown in a decision of the Commission.

In *City of Danville* v. *Southern Railway*, 34 I.C.C. 430, the Commission, in 1915, recognized the rate relationship between Lynchburg and Danville and said, at page 441, as follows:

> "The rates to points on the Southern Railway south of Lynchburg are blanketed; $2 to stations within 40 miles of Lynchburg and $2.20 to stations farther distant to and including Danville."

The relationship in rates between Danville and Lynch-

burg was again recognized by the Commission in *Carolina Coal Consumers Conference* v. *A & R*, 270 I.C.C. 291, where the Commission, at page 318, said:

> "Since the decisions in North Carolina Corporation Commiss' .. Aberdeen & R. R. Co. Supra, REDUCTIONS HAVE BEEN MADE IN THE POCAHONTAS RATE TO LYNCHBURG, RICHMOND, AND OTHER VIRGINIA POINTS; and in fact AS COMPLAINANT CHARGES THAT MOST OF THE RATES HERE ASSAILED, except to the eastern portion of the Carolinas, ARE ON A SUBSTANTIALLY HIGHER LEVEL THAN THE RATES TO THE SURROUNDING AREAS."

The above decisions of the Commission show that the report of the Commission is erroneous as a matter of law and fact as there is a definite fixed and prescribed relationship in the rates between Lynchburg and Danville. These statements are true as the Commission actually prescribed the rates to Danville and Lynchburg and, in doing so, the Commission actually prescribed the rate relationship. The District Court agreed with the Commission and dismissed the complaint.

CONCLUSION

The record before the Commission shows:

(a) That the Commission has for over 45 years prescribed a different rate on coal to Lynchburg than it prescribed to Danville and to disregard those decisions for

an alleged and unsupported allegation of competition at Danville between fine coal and natural gas at Danville is arbitrary, capricious and a gross abuse of discretion;

(b) That the defendant carriers admit in their evidence that the first reduction to Danville of 30 cents a ton was made to prevent violation of Section Four of the Act; that the second reduction of 35 cents was made to meet the rate the Southern Railway established to Danville from the Southwestern Virginia mines; and that the last reduction of 10 cents a ton to Danville was made without any justification. Therefore, to hold that the reductions in rates to Danville were made to meet competition between fine coal and natural gas is a holding unsupported by the evidence of record;

(c) That the Commission has established a rate relationship between Danville and Lynchburg on fine coal and lump coal in many decisions in which higher rates were prescribed by the Commission to Danville than the Commission prescribed to Lynchburg and those different rates actually established in law a rate relationship. In fact, the rate relationship was spelled out in 1915 and repeated in 1943 and to disregard that relation is arbitrary, capricous and an abuse of discretion; and

(d) That higher rates at Lynchburg than at Danville or the same rate at Lynchburg as the rate to Danville is unjust discrimination and undue preference and the existence of discrimination was proven in the record and established as a fact in decisions of the Commission and the existence of the competition was affirmed by a decision of the Courts in I.C.C. v. Southern, 195 U.S. 639. The failure of the Commission to so find is contrary to sub-

stantial evidence and decisions of the Court and is arbitrary, capricious and an abuse of discretion.

WHEREFORE, plaintiff respectfully prays that the appeal be granted and that the case be remanded to the lower Court with direction to find for the plaintiff.

Respectfully submitted,

W. G. BURNETTE, *Attorney for Lynchburg Traffic Bureau*

W. G. BURNETTE
1017 Church Street
Lynchburg, Virginia

March 17, 1964.

PROOF OF SERVICE

I, W. G. Burnette, attorney for Appellant, hereby certify that I have this 17 day of March, 1964, served a copy of the foregoing document upon the Appellees by mailing a copy thereof to:

Thomas B. Mason, Esq., United States Attorney for Western District of Virginia, Room ....., Federal Building, Lynchburg, Virginia.

The Solicitor General, Department of Justice, Washington 25, D. C.

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A. Paul Funkhouse, Esq., Attorney, Norfolk & Western Railway Company, Roanoke, Virginia; and

Martin A. Meyer, Jr., Esq., 200 Park Avenue, Suite 1002, New York 17, New York.

W. G. BURNETTE, *Attorney for Lynchburg Traffic Bureau*

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

Lynchburg Division

December 31, 1963

Civil Action No. 580.

Lynchburg Traffic Bureau,
a corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants,
and
NORFOLK AND WESTERN RAILWAY
COMPANY, ET AL.,
Intervening Defendants.

ORDER DENYING MOTION FOR RECONSIDERATION OR REHEARING

Upon consideration of the motion of the plaintiff to reconsider and rehear this proceeding, first presented in the form of a letter from counsel for the plaintiff dated December 12, 1963 and renewed by a formal motion filed December 21, 1963, the Court finds no ground warranting reconsideration or rehearing of its opinion and order filed in this case on November 21, 1963, and accordingly it is

ORDERED that the said motion be, and it is hereby denied.

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ JOHN PAUL
United States District Judge

/s/ THOMAS J. MICHIE
United States District Judge

A TRUE COPY, TESTE:

LEIGH B. HANES, JR., *Clerk*
By: OTWAY PETTICREW, *Deputy Clerk*

[Caption Omitted]

FINAL ORDER

Upon the opinion of this Court, constituting its findings of fact and conclusions of law, this day filed, it is

ORDERED that the complaint in this action be, and it is hereby, dismissed, the defendants and intervening defendants recovering their costs of the plaintiff.

/s/ ALBERT V. BRYAN
United States Circuit Judge

/s/ JOHN PAUL
United States District Judge

/s/ THOMAS J. MICHIE
United States District Judge

November 21st, 1963.

A TRUE COPY, TESTE:
LEIGH B. HANES, JR., *Clerk*
By: OTWAY PETTICREW, *Deputy Clerk*

[Caption Omitted]

ORDER

Upon request of plaintiff for enlargement of time in which the Clerk shall forward the record to Supreme Court and for plaintiff to complete its appeal, it is

ORDERED that the period of time be enlarged by 30 days from the present time for the record to be filed and appeal completed.

THOMAS J. MICHIE
United States District Judge
January 16, 1964

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

Lynchburg Division

Civil Action No. 580.

Lynchburg Traffic Bureau,
a corporation,
Plaintiff,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants,
and
NORFOLK AND WESTERN RAILWAY
COMPANY, ET AL.,
Intervening Defendants.

ALBERT V. BRYAN, Circuit Judge:

Freight rates on bituminous *fine* coal from mines in Kentucky, Virginia and West Virginia to Lynchburg, Virginia maintained by the defendant ten railroads, the Lynchburg Traffic Bureau charged before the Interstate Commerce Commission, violated sections 1(5), 1(6), 2, 3(1) and 4 of the Interstate Commerce Act, 49 U.S.C. 1 et seq., as unjust and unreasonable, discriminatory, prejudicial to Lynchburg and unduly preferential to Danville, Virginia, 64 miles away. The complaint, filed July 21, 1961, sought to set aside the existing rates and to establish "lawful" ones. In the subsequent proceedings before the Commission, Docket No. 33831* it found the accusation unsubstantiated, and on January 5, 1962 dismissed the complaint. Thereupon the Bureau on April 3, 1963 filed this action against the United States to set aside the Commission's order. Intervention as parties defendant was allowed the Commission and the accused carriers.

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*Lynchburg Traffic Bureau v. Chesapeake and Ohio Railway Co.; Norfolk and Western Railway Company; Carolina, Clinchfield and Ohio Railway; Interstate Railroad Company; The Kanawha Central Railway Company; Winifrede Railroad Company; Campbell's Creek Railroad Company; Kelley's Creek and Northwestern Railroad Company; New York Central Railroad Company; The Virginian Railway Company (now Norfolk and Western Railway Company); and Southern Railway Company.

Fine, as distinguished from *lump*, bituminous coal is brought into Lynchburg from these fields at $3.60 per ton. This is the same as the fine coal rate to Danville which is 59 miles farther from the origins than is Lynchburg. The lump coal rate to Danville is 53¢ more than to Lynchburg—$4.35 as against $3.82. On these facts the plaintiff Bureau predicates its complaint, that is: (1) if the lump coal rate to Lynchburg is 53¢ less than to Danville and as the service in hauling the two kinds of coal is admittedly the same, the fine coal rate to Lynchburg should be 53¢ less than to Danville; and (2) as the fine coal rate to Danville is 75¢ less than the lump coal rate—$3.60 against $4.35—the fine coal rate to Lynchburg should be 75¢ less than the lump coal rate—that is it should be $3.07 for fine and $3.82, as now, for lump, instead of $3.60 and $3.82, respectively. The rate to Lynchburg is thus said to be unreasonable, discriminatory, preferential and prejudicial.

With frankness, plaintiff's counsel states that for proof he relies upon the history of the decisions of the Commission, in that, they have always fixed a lesser rate to Lynchburg than to Danville. The Bureau adverts especially to the early cases of Staunton Brick Co. v. Chesapeake & O. Ry., 190 I.C.C. 302 (1932) and State Corp. Com. of Va. v. Norfolk & W. Ry., 190 I.C.C. 325 (1932) putting the Lynchburg rate on all coal at $2.15 per ton, and to Danville Chamber of Commerce v. Chesapeake & O. Ry., 191 I.C.C. 20 (1933) placing the Danville rate at $2.55. Later and in the same pattern, Ashland Coal & Ice Co. v. Atlantic Coast Line R.R., 256 I.C.C. 429 (1943) prescribed a rate of $2.05 on all bituminous coal to Lynchburg, and Carolina Coal Consumers Conference v. A. & R.R., 270 I.C.C. 291 (1948) established a rate to Danville at $2.55. Afterwards,

general increases raised these to $3.82 and $4.35, respectively, thus increasing the difference from 50¢ to 53¢.

Subsequently, the carriers divided the bituminous coal classification into two classes: lump and fine coal. They left the lump coal rate at the former all-bituminous-coal rate of $3.82 to Lynchburg and $4.35 at Danville, but the fine coal rate was lowered, first at Danville and, on complaint of the plaintiff Bureau, then at Lynchburg, to $3.60.

We cannot uphold the plaintiff's charge that the Lynchburg rate is unjust or unreasonable in violation of § 1(5). The Commission has never fixed a rate for fine coal at either place. Nor has it ever established any relationship between Danville and Lynchburg with regard to rates. The most it has done is to declare the maximum rates on all-bituminous-coal as just mentioned. The carriers have placed the fine coal rate at less than these maxima. In this there was nothing unlawful. United States v. Illinois Central R.R., 263 U.S. 515, 524 (1924). When the new rate is not above the maximum, nor below what is reasonable, the carriers are at liberty to adjust them within this range, although the roads cannot be required to do so by the Commission. United States v. Chicago, M., St.P.&P.R.R., 294 U.S. 499, 506 (1935). It is to be noted that the plaintiff does not attack the maximum rates here and no minimum rates have been requested or established.

That the rate on fine coal to Danville is the same as that to Lynchburg, although Danville is farther from the mines, does not alone establish, in law or in fact, Lynchburg's rates to be unfair. Lynchburg Traffic Bureau v. United States, 84 F.Supp. 1012, 1017 (W.D. Va.) (3-judge court), *aff'd*, 338 U.S. 864 (1949). There are many factors other

than distance entering into a rate. Ayrshire Collieries Corp. v. United States, 335 U.S. 573, 588, 593 (1949); Louisville & N.R.R. v. United States, 238 U.S. 1, 11, 12 (1915). Furthermore, whether or not the fine coal rates are unreasonable is a question of fact to be determined by the Commission and not one of law to be decided by the court. Lynchburg Traffic Bureau v. United States, *supra*, 84 F.Supp. 1012, 1016-17. Here the Commission has found no unreasonableness, and we think the evidence, or rather the lack of evidence indicating unreasonableness, fully justified this finding. In this situation we cannot interfere with the decision of the Commission. United States v. Pierce Auto Freight Lines, 327 U.S. 515, 535-536 (1946).

To repeat, the rate on lump coal to Danville is $4.35, but only $3.60 on fine coal—a difference of 75¢ between the two classes of coal—and at Lynchburg the rate is $3.82 on lump and $3.60 on fine coal—a difference of 22¢. On this basis, the failure of the carriers to allow Lynchburg a difference of 75¢ is charged, as already noted, as offending § 1(6) by creating an unlawful classification of coal; offending § 2 in unjustly discriminating against Lynchburg; and offending § 3 by preferring Danville to the prejudice of Lynchburg. The § 1(6) complaint obviously is but a repetition of the assertion that the rate is too high, and this we have already found unsustained. Moreover, a carrier may lawfully classify its traffic and, in this, separate the all-bituminous-coal rate into two classes. Interstate Commerce Commission v. Chicago, G.W. Ry., 209 U.S. 108, 119 (1908).

In respect to the § 2 grievance of discrimination, the answer is that this section has no relevancy here for it

applies only to rates as between shippers or receivers of similar commodities for the same haul and distance between the the same points. All such persons at Lynchburg are treated alike. The section does not apply to differences in rates between different destinations, such as Danville and Lynchburg. Ayrshire Corp. v. United States, *supra*, 335 U.S. 573, 584; Interstate Commerce Commission v. Western & A.R.R., 88 Fed. 186, 197 (1898), *aff'd*, 93 Fed. 83 (1899), modified on other grounds, 181 U.S. 29 (1901).

In response to the § 3 averment—that Danville and other places were preferred and Lynchburg prejudiced—the railroads show that they have assigned fine coal rates below those for lump coal only at such destinations, and by such amounts, as is required by competition at these points between fine coal and other fuel such as natural gas. This is unquestionably a lawful ground for the difference in rates. On this evidence and the determination that the rates are not otherwise unjust or unreasonable, the Commission has found that there was no preference or prejudice. This conclusion we cannot say is unwarranted in fact or in law. Thus it is binding upon the court. Board of Trade v. United States, 314 U.S. 534, 546 (1942).

The allegation of a violation of § 4 of the Act—forbidding a carrier to charge or receive greater compensation in the aggregate for a shorter than a longer haul—was apparently abandoned by the plaintiff in view of the equalization of the fine coal rates to Lynchburg and Danville. Certainly, however, the Commission's denial of it cannot on this record be overborne.

We have examined the other contentions of the plaintiff but also find no merit in them. The complaint will be dis-

missed for the reasons set forth in this opinion, which is adopted by the court as a statement of its findings of fact and conclusions of law.

A TRUE COPY, TESTE:

LEIGH B. HANES, JR., *Clerk*
By: OTWAY PETTICREW, *Deputy Clerk*

APPENDIX B

This report will not be printed in the permanent series of Interstate Commerce Commission reports.

INTERSTATE COMMERCE COMMISSION
Service Date, November 6, 1962

No. 33831.

LYNCHBURG TRAFFIC BUREAU

v.

CHESAPEAKE AND OHIO RAILWAY COMPANY ET AL.

Decided October 29, 1962.

Carload rates on bituminous fine coal from origins in Virginia, West Virginia, and Kentucky to Lynchburg, Va., found not shown to be unjust, unreasonable, or otherwise unlawful. Complaint dismissed.

W. G. Burnette for complainant.

John W. Hanifin, Preston C. Shannon, A. Paul Funkhouser, and *Martin A. Meyer, Jr.,* for defendants.

REPORT OF THE COMMISSION
RATES AND PRACTICES REVIEW BOARD, MEMBERS BROWN, PROUT, AND ROCK BY THE BOARD:

The modified procedure was followed. Exceptions to the examiner's recommended report and order, and replies thereto, were filed by the complainant and the defendants. Exceptions and requested findings not specifically discussed herein nor reflected in our findings or conclusions have been considered and found not justified.

The complainant is a non-profit organization incorporated under the laws of the State of Virginia. The complainant's members are various individuals and companies engaged in business at Lynchburg, Va.

The defendants[1] are common carriers by railroad engaged in the transportation of property, including bituminous coal, between mines and other points in Kentucky, Virginia, and West Virginia, on the one hand, and on the other, points in North Carolina, South Carolina, and Virginia, including

[1] The defendants are The Chesapeake and Ohio Railway Company, Norfolk and Western Railway Company, Carolina, Clinchfield and Ohio Railway Company, Interstate Railroad Company, The Kanawha Central Railway Company, Winifrede Railroad Company, Campbell's Creek Railroad Company, Kelley's Creek and Northwestern Railroad Company, The New York Central Railroad Company, Virginian Railway Company (now Norfolk and Western Railway Company), and Southern Railway Company. When referred to herein, the carriers' titles are shortened or their initials are used.

Lynchburg. Bituminous coal includes two types of bituminous coal, known as fine coal and lump coal.

By complaint filed July 21, 1961, the complainant alleges that the rates[2] charged by the defendants on fine coal, described as "coal which will pass through a bar screen not exceeding one and one-half inches between bars, or its equivalent a two-inch mesh or two-inch round perforation", and on coal, other than fine, from mines and other points in the States of Kentucky, Virginia, and West Virginia to Lynchburg, Va., are unjust and unreasonable in violation of section 1, paragraphs (5) and (6), of the Interstate Commerce Act; unjustly discriminatory against Lynchburg and receivers of fine coal at that point to the extent the rates to that destination are relatively higher, distance considered, than those to Danville, Va., other points in Southern Virginia, and points in North Carolina and South Carolina in violation of section 2 of that Act; unduly prejudicial to Lynchburg and receivers of fine coal there located and unduly preferential of Danville, other points in Southern Virginia, and points in North Carolina and South Carolina, in violation of section 3 thereof; and in violation of section 4 of the act. The complainant seeks the prescription of lawful rates to Lynchburg for the future.

The coal originates at mine groups in Virginia, West Virginia, and Kentucky, generally known as the Pocahontas, New River, Tug River, Upper Buchanan, Virginian, Clinch Valley No. 1, Clinch Valley No. 2, Dante, N.F.&G., Thacker, Kenova, Tiller, Clincho, Interstate, and

[2] Rates and rate differences are stated per net ton.

Kanawha districts. On eastbound traffic all of the origins within the first-named 9 districts are in the same rate group, hereinafter called the base group, and those in the remaining 6 districts are in a group differentially related to the base group.

The base group, except the Dante and New River districts, is served by the Norfolk & Western; the New River district is served by the Chesapeake & Ohio; the Dante and Clincho districts by the C. C. & O.; the Interstate district by the Interstate Railroad Company; the N.F.&G. district by the New York Central; and within the Kanawha district certain origins are served by the Campbell's Creek, and others either by the Kanawha Central, the K.C. & N.W., or the New York Central.

Lynchburg and Danville are on the main line of the Southern. Lynchburg is 64 miles north of Danville and is this distance nearer to mines in the base group. In addition to the Southern, it is served by the Norfolk & Western and the Chesapeake & Ohio. The lines of the latter two carriers also serve the mines in the base group. Danville is served also by The Atlantic and Danville Railway Company and the Carolina and Northwestern Railway Company. Winston-Salem and Durham, N. C., are served by the Norfolk & Western and the Southern, and Greensboro, N. C., is served by the Southern.

The rates presently in effect and the average distances from the base group to Lynchburg, Danville, and representative points in North and South Carolina are shown in the following table:

Destinations	Average distances[1]	Rates[2] Lump coal	Rates[2] Fine coal	Rate differences, fine under lump
	(Miles)			(Cents)
Lynchburg, Va.	199	$3.82	$3.60	22
Danville, Va.	258	4.35	3.60	75
Winston-Salem, N. C.	266	4.51	3.71	80
Greensboro, N. C.	278	4.51	3.71	80
Durham, N. C.	316	4.62	3.84	78
Columbia, S. C.	(a)	5.10	4.30	80
Greenville, S. C.	(a)	5.05	4.25	80

[1] Distances to points named are those from the Pocahontas-New River districts shown in *Danville Chamber of Commerce* v. *Chesapeake & O. Ry. Co.*, 191 I.C.C. 20.

[2] The rates shown above include general increases to and including those authorized in Ex Parte No. 223.

(a) No distances shown.

The complainant seeks a rate on fine coal from the base group to Lynchburg of $3.07 or 53 cents lower than the rate on the same commodity to Danville, and from the higher-rated origin groups to Lynchburg it seeks a rate 10 cents per ton higher than the rate sought from the base group.

The allegation under section 1 is predicated upon prior proceedings in which just and reasonable maximum rates were prescribed on bituminous coal to Lynchburg and Danville. Attention is directed to *Staunton Brick Co.* v. *Chesapeake & O. Ry. Co.*, 190 I.C.C. 302, decided December 19, 1932, wherein a rate of $2.15 was prescribed from the New River district to Lynchburg; *State Corp. Comm. of Virginia* v. *Norfolk & W. Ry. Co.*, 190 I.C.C. 325, decided on the same date, wherein the same rate was pre-

scribed to Lynchburg from the Pocahontas district and the mines served by the Virginian; and *Danville Chamber of Commerce* v. *Chesapeake & O. Ry. Co.*, 191 I.C.C. 20, decided January 30, 1933, wherein a rate of $2.55 was prescribed from the Pocahontas-New River group to Danville. The rates in those proceedings were prescribed on all bituminous coal, and no rate relationship as such was prescribed therein between Lynchburg and Danville. Nevertheless, the complainant takes the position that since the rates prescribed therein were to apply on all types of bituminous coal then moving, including lump coal and fine coal, and that the rate prescribed to Lynchburg was 40 cents lower than that to Danville, this difference was intended to reflect the greater transportation service to the latter destination. It is urged also that, since subsequently-authorized increases in the prescribed rates to both destinations have enlarged the 40-cent difference to 53 cents, the rate on both lump and fine coal should now be 53 cents lower to Lynchburg than to Danville.

Reference is made also to *Ashland Coal & Ice Co., Inc.*, v. *Atlantic Coast Line R. Co.*, 256 I.C.C. 429 (1943), and *Carolina Coal Consumers Conference* v. *A. & R. R. Co.*, 270 I.C.C. 291 (1948). In the former a rate of $2.05 was prescribed on bituminous coal from the base group to Lynchburg, and in the latter a rate of $2.55 was prescribed from the Pocahontas district to Danville. The 50-cent spread between those rates, as increased by subsequently-authorized general increases, is now 53 cents, the difference between the rates on lump coal as shown in the foregoing table. Although the rates prescribed in the prior proceedings were established by the defendants on all types of bituminous coal, the complainant stresses that, subsequently, lower rates were established on fine coal to those destina-

tions than on lump coal. As appears from the foregoing table, the present rate to Lynchburg is 22 cents lower on fine than on lump coal, as compared with differences of 75 to 80 cents to the compared destinations.

The earnings from the assailed rate of $3.60 on fine coal to Lynchburg on a load of 100,000 pounds are 90.4 cents a car-mile, whereas the same rate to Danville yields 69.7 cents a car-mile. The rate sought of $3.07 would yield 77.1 cents a car-mile. If no commodity rates were published, the difference in the class rates as between Lynchburg and Danville under the rating provided in the uniform freight classification would be 4 cents per 100 pounds or 80 cents a ton.

Lump and fine coal generally move in the same train, usually in separate cars, and both types of coal are accorded the same handling. There is thus no substantial difference in the transportation services performed thereon by the defendants.

In respect of the allegation under section 2 of the act, the complainant relies on the same type of evidence as that submitted in support of the section 1 allegation. It contends, in substance, that by establishing rates to Danville and points in North and South Carolina from 75 to 80 cents lower on fine than on lump coal, and failing to maintain rates to Lynchburg reflecting the same difference on fine under lump coal, the defendants are unjustly discriminating against Lynchburg.

In support of the section 3 allegation, the complainant contends that by establishing rates on fine coal to Lynchburg only 22 cents below the corresponding rates on lump

coal, and maintaining rates to Danville and points in North and South Carolina reflecting greater spreads, the defendants are unduly prejudicing Lynchburg and consignees there located and unduly preferring the compared points and consignees located at such points. It stresses that Lynchburg and each of the compared points have chambers of commerce or other like organizations which compete with one another in efforts to attract new and retaining existing industries, that each such city requires just, reasonable, and otherwise lawful rates on a basic raw material such as fine coal to permit its development and growth, and that Lynchburg by reason of its relatively higher rates, distance considered, is in an unfavorable competitive position compared with Danville, Winston-Salem, Greensboro and Durham.

The record fails to show that any new industry has refused to locate at Lynchburg, or that any industry has left that city because of the assailed rate situation, or that any industry was induced thereby to locate at other points named. The complainant's evidence lists various commodities produced at each of the compared points and shows that many such products are the same or similar in nature. Attention is directed to the following in *Carolina Coal Consumers Conference* v. *A. & R. R. Co., supra*, page 314:

> Industrially, Danville is similar in many respects to points north and east thereof, such as Lynchburg and Richmond, and south thereof, such as Winston-Salem, Greensboro, and Durham.

In that proceeding, no violation of section 3 was alleged.

The complainant points out also that the population of

Lynchburg, Danville, and Durham in the decade from 1950 to 1960 increased by 15.3, 32.3, and 10.2 percent, respectively. There is no evidence, however, which shows that the rate situation complained of was responsible for the smaller growth at Lynchburg.

The defendants point out that no difference in rates on lump and fine coal has been prescribed by the Commission from these origins to any destination served by them. They state that whenever rates on fine coal have been established by them on a level lower than on lump coal, the extent of the reduction on fine coal to each destination has been determined by the degree of competition as between different types of fuel, or between different rail carriers or with other modes of transportation. They point to the facts that there is no standard definition of fine coal, that the descriptions of such coal may vary dependent upon the competitive circumstances, and that their coal tariffs contain various descriptions other than that mentioned in the complaint. It appears, however, that the above-quoted description in the complaint is the same as that of fine coal to Danville, Winston-Salem, Greensboro, and Durham.

The rate to Lynchburg on both fine and lump coal prior to August 21, 1961, reflected the basis prescribed in *Ashland Coal & Ice Co.* v. *Atlantic Coast Line R. Co.*, *supra*, as subsequently modified by authorized general increases. On the latter date the rate on fine coal was reduced 22 cents as shown in the foregoing table. No corresponding reduction was made in the rate on lump coal. In prescribing the rate on bituminous coal, both fine and lump, in the *Ashland Coal and Ice Co.* case the Commission made no reference to Danville nor to any point in southern Virginia

or North Carolina. The defendants therefore urge that the rate prescribed to Lynchburg bore no relation to such destinations, but was determined in relation to the rates then applicable to Buena Vista, Farmville, and Charlottesville, Va. Later, however, in *Carolina Coal Consumers Conference* v. *A. & R. R. Co., supra,* the Commission passed upon the lawfulness of the rate to Danville, as well as the rates to other points south thereof, including Winston-Salem, Greensboro, and Durham, and in doing so reference was made to the report in the *Ashland Coal & Ice* case and to the shorter distance to Lynchburg than to Danville and the above-named North Carolina destinations. It is thus clear that in prescribing rates on bituminous coal to Danville and the North Carolina points in the latter proceeding, the Lynchburg rate and the distances for which it applied were considered in determining the rates prescribed therein to Danville and the other more distant points.

In explaining the reasons for establishing rates on fine coal lower than on lump coal, the defendants testified that early in 1954 the carriers serving destinations in North and South Carolina ascertained that certain consumers, particularly electric-utility and other industries, were either substituting or threatening to substitute natural gas in lieu of fine coal and that there had been a decline in the rail movement of fine coal to such consumers. Thereupon they reduced the rates on such coal by 35 cents. Industries of this type do not normally use lump coal, and consequently there was no competitive necessity for a reduction on lump coal. The reduction took effect on April 8, 1954, and on the same date the reduced level was established as maximum at intermediate points in southern Virginia to avoid violations of section 4 of the act. By the latter action the

rate from the base group to Danville, previously $3.98 on lump and fine coal, was reduced on fine coal to $3.68. At that time the rate to Lynchburg was $3.45, and that rate was continued in effect.

The reduction then made met natural gas competition until 1958. Due to authorized general increases during the intervening period, aggregating 30 cents a ton, the carriers were again faced with the same situation as in 1954, and, on July 10, 1958, a further reduction of 35 cents was made to all points in North and South Carolina. Higher rates were maintained to intermediate points under authority of Fourth Section Order No. 18957 issued on July 9, 1958, until September 16, 1958, when the Southern, from its origins in southwestern Virginia and from origins on the Interstate Railroad, reduced the rates to Danville and other destinations in southern Virginia by 35 cents from mines on the Southern and $1 from mines on the Interstate. This compelled a reduction on October 20, 1958, of 35 cents from the base group to Danville and other points in southern Virginia. Fourth-section relief permitted the rate then in effect to Lynchburg to remain undisturbed. Later, effective April 29, 1959, all of the carriers established a further reduction of 10 cents to all points in southern Virginia, North Carolina, and South Carolina.

When the foregoing reductions were made, the rate to Lynchburg was $3.75 on both lump and fine coal. The resulting rates on fine coal from the base group to Danville became $3.63 on October 20, 1958 and $3.53 on April 29, 1959. On October 24, 1960, due to the increase of 7 cents authorized in Ex Parte No. 223, the rate from the base group to Danville became $4.35 on lump coal and $3.60 on fine coal, compared with $3.82 to Lynchburg on both

types of coal, and that situation prevailed when the complaint was filed. The existence of a higher rate on fine coal to Lynchburg than to Danville was removed on August 21, 1961, when the rate on fine coal to Lynchburg was reduced from $3.82 to $3.60, the same as the rate on fine coal to Danville, thus removing the basis for the complainant's allegation under section 4 of the act.

The defendants contend that, since the rate on fine coal to Lynchburg is now the same as that presently maintained to Danville, there is no present cause for complaint. Moreover, they assert that Danville is served by the Transcontinental Gas Pipe Line Corporation, a major gas line, whereas Lynchburg is served by a smaller carrier, the Lynchburg Gas Company, which receives only a limited supply of gas from the Atlantic Seaboard Corporation; that an application to the Federal Power Commission by the Lynchburg Gas Company in 1959 for authority to secure an alternate supply of gas from the Transcontinental Gas Pipe Line Corporation to permit it to serve the major coal-consuming industries at Lynchburg was denied, which denial was upheld by the courts; and that as a result the competition and the threat of competition between gas and fine coal is materially greater at Danville than at Lynchburg. They state also that in 1961 the Norfolk & Western and the Chesapeake & Ohio delivered about 143,000 tons of coal at Lynchburg, 94 percent of which was delivered to 16 industries, and that none of those industries, nor any of the consumers to whom the remaining 6 percent of the aggregate tonnage was delivered, is in competition with any consumer of fine coal at Danville.

Discussion and Conclusions.—The hearing examiner concluded that the complainant had failed to sustain its alle-

gations that assailed rates are unlawful, in violation of sections 1, 2, 3, or 4 of the act. The complainant excepted to the examiner's findings with respect to sections 1, 2, and 3. No exception was taken to the examiner's finding that the basis for the section 4 allegation had been removed by the subsequent establishment by the defendants of the same rate on fine coal to Lynchburg as that applicable on the same commodity to Danville. We concur in that finding.

Under section 1 of the act, the railroads are entitled to publish and charge reasonable maximum rates. So long as the railroads do not go below the minimum limit of reasonableness they may voluntarily publish rates which do not attain the maximum, but the Commission cannot, under section 1 alone, require them to do this. *Eastern Class Rate Investigation*, 164 I.C.C. 314, 382, and *South Chicago Coal & Dock Co.* v. *Chicago S. L. Ry. Co.*, 223 I.C.C. 619, 622. The prescribed rates on bituminous coal to Lynchburg and the other compared destinations were based upon the respective distances from the base origin group, and those rates as modified by subsequently authorized general increases, now reflect reasonable maxima levels. Although the prescribed maximum rates are now maintained on lump coal, the record shows that the defendants were and are faced with competition as between fine coal and natural gas, and for that reason, rates below the maximum prescribed or authorized by the Commission have been established on fine coal to various points in the south, including Danville. While the Lynchburg rate and the distance for which it applied were considered by the Commission in prescribing the rate to Danville, no specific relationship between bituminous coal rates to Lynchburg and to Danville was prescribed or required by the Commission in the *Carolina Coal Consumers case*, *supra*, nor has any specific

relationship in the rates on either fine or lump coal to Lynchburg and Danville been prescribed in any other proceeding. We conclude that the complainant has failed to show the assailed rates are unjust and unreasonable in violation of section 1 of the act.

In order to prove a violation of section 2 of the act, the evidence must show that the defendants, either directly or indirectly, charge, demand, collect, or receive from one shipper a greater or less compensation than from another for the performance of a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions. There can be no unjust discrimination within the meaning of section 2 of the act when the compared transportation is not from and to the same points as the transportation allegedly subject to the unjust discrimination. See *Lawrenceville Cooperage Co.* v. *Akron, C. & Y. Ry. Co.*, 226 I.C.C. 773, 781, and *Gar Wood Industries, Inc.*, v. *Alton & S.R.*, 263 I.C.C. 611, 616. All receivers of fine coal at Lynchburg are accorded the same rate from the same origins and for the same service, and consequently no discrimination in violation of section 2 is shown by the evidence. See *Miller Waste Mills, Inc.*, v. *Chicago, M., St. P. & P. R. Co.*, 226 I.C.C. 451, 453.

On exceptions, the complainant urges that its showing of more favorable rates to Danville than to Lynchburg establishes a *prima facie* case of undue prejudice and preference, in violation of section 3 of the act; and that, as a matter of law, the burden to show conclusively that the rates here complained of are not unduly prejudicial or preferential rests upon the defendants. In support, it cites *State of*

New York v. United States, 331 U.S. 284, in which the following appears:

> It is a matter of right, not of grace by the railroads, that regions and shippers shall not be prejudiced or their competitors preferred.

Nothing in the foregoing decision may be interpreted as overruling the oft-repeated holdings of the courts and the Commission that a mere difference in rates or in distances between particular points at the same rate is inadequate support for a section 3 finding; and that the burden of supporting an allegation under that section with adequate proof rests upon the complaint. To establish undue prejudice, in addition to the showing of a rate difference or a difference in distance at the same rate, there must be evidence of forceful competition between persons or localities under the rates complained of, and that the rate adjustment has operated to the complainant's disadvantage. See *Cudahy Packing Co.* v. *Atchison, T. & S.F. Ry. Co.*, 234 I.C.C. 569, 575.

It is true that where such evidence is of record, the burden is upon the carriers to show by convincing evidence that a sufficient dissimilarity in the transportation circumstances exists to justify a difference in the rate treatment, *Continental Steel Corp.* v. *New York, C. & St. L. R. Co.*, 256 I.C.C. 167, 174, but the absence of this latter evidence would not afford a basis for relief without the above-indicated showing by the complainant.

Here, the complainant has failed to show that there is competition between consumers of fine coal at Lynchburg and consumers of like coal at Danville, or that the rate

adjustment has operated to the disadvantage of the complainant or any receivers of coal there located. On the other hand, the defendants have shown, without contradiction, that the present rates on fine coal to Danville are compelled by gas competition, and that this competitive factor is not compelling at Lynchburg. In these circumstances, there is no sound basis for a finding of undue prejudice or preference.

As stated, the basis for the allegation under section 4 was removed on August 21, 1961, when the same rate on fine coal was established to Lynchburg as to Danville.

We find that the assailed rates are not shown to be unjust, unreasonable, unjustly discriminatory, unduly prejudicial, or violative of section 4 of the act. The complaint will be dismissed.

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Rates and Practices Review Board, held at its office in Washington, D. C., on the 29th day of October, A. D. 1962.

No. 33831.

LYNCHBURG TRAFFIC BUREAU

v.

CHESAPEAKE & OHIO RAILWAY COMPANY ET AL.

This proceeding being at issue upon complaint and an-

swers on file, and having been duly submitted by the parties, and full investigation of the matters and things involved having been made, and said Board having, on the date hereof, made and filed a report containing its findings of fact and conclusions thereon, which report is hereby referred to and made a part hereof:

It is ordered, That the complaint in this proceeding be, and it is hereby, dismissed.

By the Commission, Rates and Practices Review Board.

(SEAL)

HAROLD D. MCCOY,
Secretary

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

Case No. 931.

LYNCHBURG TRAFFIC BUREAU, a corporation,
Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

and

NORFOLK & WESTERN RAILWAY COMPANY, *et al.*
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.

MOTION TO AFFIRM.

MARTIN A. MEYER, JR.,
200 Park Avenue,
New York 17, N. Y.,
Attorney for Rail Appellees.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

Case No. 931.

LYNCHBURG TRAFFIC BUREAU, a corporation,

Appellant,

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,

and

NORFOLK & WESTERN RAILWAY COMPANY, *et al.*,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA.

Motion to Affirm.

The Appellee railroads, Norfolk and Western Railway Company, Chesapeake and Ohio Railway Company, Carolina, Clinchfield and Ohio Railway, Interstate Railway Company, The Kanawha Central Railway Company, Winifrede Railway Company, Campbell's Creek Railroad Company, Kelley's Creek and Northwestern Railroad Company, The New York Central Railroad Company, and Southern Railway Company, are parties to this appeal by virtue of having been permitted to intervene in the proceedings before the United States District Court for the Western

District of Virginia by order of such court dated June 18, 1963.

These Appellees hereby move that the judgment of such District Court be affirmed on the ground that the questions on which the decision of the cause depends are so unsubstantial as to need no further argument.

Background and Nature of the Proceedings.

The rail Appellees are advised that motions to affirm will be filed by the other Appellees herein, United States of America and Interstate Commerce Commission, and will endeavor, therefore, to avoid unnecessary repetition of the facts and arguments made in such motions.

The pertinent facts as they appear from the report of the Commission and the opinion of the District Court reproduced as Appendices A and B to the Jurisdictional Statement are so clearly set forth in such report and opinion that they need no extensive recital here.

It must be emphasized, however, that the rates under attack do not apply on coal generally but rather on the type of coal commonly known as fine coal. As found by the Commission, this type of coal is defined in the various tariffs published by rail carriers in differing ways. There is no standard definition of fine coal. In the tariffs involved in the present case, it is described as "coal which will pass through a bar screen not exceeding one and one-half inches between bars, or its equivalent, a two inch mesh or two inch round perforation". In other tariffs, there are other definitions (Jur. St. 37).

Unlike *lump* coal, *fine* coal is used mainly as a so-called "boiler fuel" in industrial installations such as factories or electric power generating plants. Because of its special usage, fine coal is particularly susceptible to the competi-

tion of other types of fuel such as natural gas or oil. Consequently, the rail carriers, in order to retain this important traffic, frequently find it desirable to reduce their rates on fine coal to a level below those applicable on lump coal in circumstances where the industrial users of fine coal are in a position to substitute the use of oil or natural gas. Such reductions are, of course, made only in the specific situations and to the specific destinations where the competitive elements that call for them exist. There would be no reason for them otherwise (Jur. St. 39).

The Interstate Commerce Commission has consistently held that the publication of fine coal rates below the level of lump coal rates under competitive conditions just described is a matter within the discretion of the carriers, who, in the exercise of such discretion, are permitted to make such reductions but cannot be required to. No violation of Sections 1 or 3 of the Interstate Commerce Act results from such publication. As far as Section 1 is concerned, if the lump coal rates are not above a reasonable maximum level, *ex hypothesis* a lower fine coal rate could not be unreasonably high and, although a fine coal rate might conceivably violate Section 1 by being unreasonably low, no such situation exists or is even alleged to exist in this case. With respect to Section 3, it has long been established that where differences in the rail rates to an allegedly preferred and an allegedly prejudiced destination are attributable to the competition of other forms of fuel or other forms of transportation existing at one destination and not at the other, such differences in the competitive situation create dissimilar circumstances and conditions and consequently, the rates do not result in undue or unreasonable preference or prejudice within the meaning of Section 3.

It is against this background that the Commission found that publication by the rail Appellees of fine coal rates to Lynchburg on the same level as the fine coal rates to Danville was lawful and accordingly dismissed the complaint (Jur. St. 42-47). The District Court properly upheld the Commission (Jur. St. 29-31).

The Questions Propounded by Appellant are Unsubstantial.

Appellant presented three questions in its Jurisdictional Statement (Jr. St. 2, 3). The first two refer to the holdings of the Commission and the District Court with respect to the issues arising under Section 1 of the Interstate Commerce Act. The third question apparently relates to the Sections 2 and 3 issues.

It is clear that the gist of Appellant's complaint as described throughout its Jurisdictional Statement is the same as it was in the Commission and Court phases of the case. Appellant contended in the proceedings below, as it contends in its Jurisdictional Statement (pp. 6 and 7), that the fine coal rates to Lynchburg are unlawful under the Interstate Commerce Act because such fine coal rates do not bear the same relationship to the lump coal rates to Lynchburg that the fine coal rates to Danville bear to the lump coal rates to Danville. This, according to Appellant, renders the Lynchburg fine coal rates unlawful "as a matter of law". Accordingly, as the District Court held, Appellant considered it unnecessary to introduce any substantial evidence either to show that the fine coal rates to Lynchburg are above or below a reasonable level or that there is any competition between the fine coal consumers at Lynchburg and the fine coal consumers at Danville or

between Lynchburg and Danville themselves as far as the consumption of fine coal is concerned (Jur. St. 27).

As both the Commission and the District Court found, Appellant's entire argument is predicated on the fallacious assumption that the Commission has prescribed a rate relationship or differential on *lump* coal between Lynchburg and Danville, and it is from this premise that Appellant concludes that a similar relationship does or should exist on the *fine* coal rates to the same destinations (Jur. St. 28, 43, 44). The Commission, construing its own decisions, found that no such relationship has ever been prescribed or exists between either the *lump* or *fine* coal rates to the two points (Jur. St. 43-44). Therefore, since Appellant failed even to allege, much less prove, that the fine coal rates to Lynchburg were above a maximum reasonable level or that fine coal consumers in Lynchburg were in competition with fine coal consumers at Danville or that the rail and natural gas competitive conditions at Danville and Lynchburg were similar, the complaint was dismissed. The District Court properly upheld the Commission (Jur. St. 28-31, 42-47).

This appeal clearly presents no substantial question warranting review by this Court. This Court has held that it is the Commission that has the primary responsibility to determine the lawfulness of rail rates. *Mississippi Valley Barge Line Company* v. *United States*, 292 U. S. 282. It is also for the Commission to determine whether, under its own decisions, rate relationships in fact have been established between various points and what the permissible range of rates within such relationships may be. *New York* v. *United States*, 331 U. S. 284; *Ayrshire Collieries Corporation* v. *United States*, 335 U. S. 573, 592-593. In this instance, no substantial factual evidence was presented by Appellant who, throughout all phases of these

proceedings, relied exclusively on the contention that the rates at issue are unlawful because of alleged Commission prescribed relationships. On the other hand, evidence justifying the rates was introduced by the rail carriers. Certainly, therefore, the Commission's finding that it has never prescribed any such relationships and that the rates are lawful presents no substantial question for this Court. The Commission decisions cited by Appellant demonstrate on their face that the Commission has never prescribed a specific relationship in either lump coal or fine coal rates between the mine origin groups and Lynchburg and Danville; that the Commission has merely prescribed at one time or another maximum reasonable rates on lump coal to one or the other of these points; and that it has prescribed no rates whatever on fine coal. The interpretation by the Commission of its own decisions, which is the only thing Appellant is in reality complaining about before this Court, creates no question with which the Supreme Court need be concerned.

The Court Below Properly Disposed of all Issues.

It Was Correctly Found That The Alleged Relationships Between the Lump Coal And Fine Coal Rates Does Not Exist And That The Fine Coal Rates to Lynchburg Are Not In Violation Of Section 1.

The Commission's two principal decisions on coal rates to Lynchburg and Danville in recent years are described in its report and in the District Court decision (Jur. St. 27-28, 35-37, 39). The Commission in *Ashland Coal and Ice Company, Inc.* v. *Atlantic Coast Line Railroad Company, et al.*, 256 I. C. C. 429 (1943), prescribed the present maximum lump coal rates to Lynchburg. The present maximum coal

rates to Danville were prescribed in an altogether different proceeding, *Carolina Coal Consumers Conference* v. *A. & R. R. Co.*, 270 I. C. C. 291 (1948). Fine coal rates were not at issue in either case. Nowhere in the Commission's reports in these cases, or in any others dealing with coal to Lynchburg and Danville, has the Commission fixed any rate relationship between Lynchburg and Danville as far as any kind of coal rates are concerned. In the *Ashland* case, *supra*, the Commission considered the Lynchburg rates in relationship to the rates to such points as Buena Vista, Va., Charlottesville, Va., and Farmville, Va., rather than Danville which was not even mentioned in this connection. In the *Carolina Coal Consumers Conference* case, rates prescribed were rates to Danville and the Carolina points. No rate was prescribed to Lynchburg, which was not at issue in that proceeding, and although rates to various points in Virginia, North Carolina, South Carolina and Georgia were referred to for purposes of comparison, the basis and rationale of the Commission's decision did not rest upon the prescription of any rate relationship between the destinations directly involved in the case and other specific destinations such as Lynchburg.

Nor do the other cases found in the rate "history" relied upon by Appellant in its Jurisdictional Statement (pp. 3-5, 11-12), support Appellant's contention in this respect. None of such cases involved rates on fine coal. They merely show that at different times, different maximum rates have been prescribed on lump coal to Danville and in so doing, the Commission sometimes made rate comparisons involving Lynchburg and many other points. It is noteworthy that in none of these cases did the Commission hold that it was unlawful for rates to Danville

and Lynchburg to be on the same level, as the fine coal rates to the two points are at the present time.

It is clear, therefore, that since the alleged *lump* coal rate relationship between Lynchburg and Danville has never been prescribed by the Commission, it can hardly serve as the basis for Appellant's contention that *fine* coal rates to the two destinations should be related in any particular way. The Commission has never prescribed any fine coal rates to Lynchburg, Danville or any other point referred to or involved herein. It correctly found that the carriers, if competition with other fuels or other carriers or forms of carriage renders it advisable, may publish lower rates on fine coal than on lump coal so long as such fine coal rates do not fall below a minimum level of reasonableness, but that the Commission has consistently declined to require them to do so (Jur. St. 43). This has been the rule for many years. See *Midland Electric Coal Corporation* v. *Chicago & North Western Railway Co.*, 215 I. C. C. 562, 577; *Eastern Class Rate Investigation*, 164 I. C. C. 314, 382; *South Chicago Coal and Dock Co.* v. *Chicago, S. L. Ry. Co.*, 223 I. C. C. 619, 622.

Never having required the publication of *any* fine coal rates from the origins involved in this case, the Commission has, of course, never fixed any relationship between fine coal rates from such origins to Danville or Lynchburg or any other destination. Nor has it prescribed what differences, if any, must exist between fine coal rates and lump coal rates from any origin served by Appellees to any specific destination. As far as Section 1 is concerned, the publication of fine coal rates to any given destination is a matter within the discretion of the carriers who are free to exercise such discretion where they deem it advisable in light of competition from other fuels or other carriers or

forms of carriage. As the Supreme Court said in *Barringer & Co.* v. *United States*, 391 U. S. 1, 7:

> "It has long been established by our decisions that differences in competitive conditions may justify a relatively lower line-haul charge over one line than another, and that it is for the Commission, not the courts, to say whether those differences are sufficient to show that a difference in rates established to meet those conditions is not an unjust discrimination or otherwise unlawful."

As for the factual evidence, Appellant offered nothing to prove that the fine coal rates to Lynchburg are above a reasonable maximum level and did not even contend that they fall below a reasonable minimum level within the meaning of Section 1. Appellant, therefore, apparently concedes that they fall within the "zone of reasonableness" within which a carrier is free to adjust its charges for itself. See *United States* v. *M., St. P. & P. R. Co.*, 294 U. S. 499. In any event, the evidence introduced by the rail Appellees showed affirmatively by comparison with other fine coal rates that the Lynchburg fine coal rates are not above a reasonable maximum. Further, Appellant itself urges that the lump coal rates to Lynchburg be used as a measuring rod for what it contends would constitute a proper level for the fine coal rates, and therefore concedes by clear implication that the Lynchburg lump coal rates are not excessively high. It follows, therefore, that the publication of fine coal rates to Lynchburg on a lower level than the lump coal rates could not possibly produce a fine coal rate that exceeds a maximum level of reasonableness or is otherwise in violation of Section 1 and that the Commission was correct in so finding.

It Was Correctly Found That The Rates At Issue Are Not In Violation Of Section 2 of the Interstate Commerce Act.

No substantial question arises with respect to the findings on the alleged violation of Section 2 of the Interstate Commerce Act. It is fundamental that Section 2 applies only when the transportation is from and to the same points and has no application whatever to rates applying to such widely separated destinations as Lynchburg and Danville, *Ayrshire Collieries Corporation* v. *United States, supra; Interstate Commerce Commission* v. *Western & A. R. R.*, 88 Fed. 186, aff'd. 93 Fed. 83, modified on other grounds 181 U. S. 29; *Lawrenceville Cooperage Company* v. *Akron, C. & Y. Ry. Co.*, 226 I. C. C. 773, 781; *Carr Wood Industries, Inc.* v. *Alton & S. R.*, 263 I. C. C. 611, 616; *Miller Waste Mills Inc.* v. *Chicago, M., St. P. & P. R. Co.*, 226 I. C. C. 451, 453. The Commission and the District Court correctly so held (Jur. St. 29-30, 44). Moreover, the fine coal rates to both Lynchburg and Danville are the same and therefore, there could be no possibility of finding that the rail Appellees are charging any person a "greater or less compensation for any service rendered" than they are charging any other person within the meaning of Section 2.

It Was Correctly Found That The Rates Are Not Unlawful Under Section 3 Of The Interstate Commerce Act.

Nowhere in its Jurisdictional Statement does Appellant contend on the Section 3 issue that it proved the existence of any competition between Lynchburg and Danville or among any fine coal consumers therein that could possibly give rise to undue or unreasonable preference or prejudice within the meaning of Section 3. Appellant now states, however, that the rail carriers introduced no evidence before the Commission to show that the rate disparity was

not the cause for smaller growth in Lynchburg (Jur. St. 8). But, of course, it was Appellant that had the burden of proving that Lynchburg or shippers located therein were placed at a competitive disadvantage by reason of having the same rates on fine coal as apply at Danville. A mere showing of the rates to two points, even where a difference exists, does not prove a violation of Section 3. *Board of Trade* v. *United States*, 314 U. S. 534, 546. It was Appellant's burden to show, through evidence of competition between the persons or localities in question, that unjust or undue prejudice or preference exists. *United States* v. *Illinois Central R.R. Co.*, 263 U. S. 515, 524; *Manufacturers R. Co.* v. *United States*, 246 U. S. 457; *Texas & Pacific Railway Company* v. *Interstate Commerce Commission*, 162 U. S. 197; *Interstate Commerce Commission* v. *Baltimore & O. R.R. Co.*, 43 Fed. 37, aff'd 145 U. S. 263.

In this instance Appellant failed completely to go beyond the most general allegations of competition. The Commission accordingly would have been justified in dismissing the Section 3 allegation on mere failure of proof, but the validity of its action does not rest on this ground alone. Actually, the record contained positive evidence that no competition exists. It was supplied by the Appellee railroads as the Commission found in its report (Jur. St. 42). Appellant, despite every opportunity to do so, offered no evidence to contradict or rebut Appellees' proof on the issue of competition, presumably because none exists. It is plain, therefore, that the record showed no competitive situation between the Lynchburg and Danville points or among any persons in the two points that could possibly justify a finding that the identical fine coal rates to Lynchburg and Danville are in violation of Section 3.

The Commission made a further finding that the competition from natural gas and from other carriers at Dan-

ville has no counterpart at Lynchburg and that this requires a finding that no violation of Section 3 exists. Appellant seems to suggest in its Jurisdictional Statement (p. 13), that the Commission's findings in this respect were the sole basis for its conclusion that there was no violation of Section 3. This is obviously incorrect since, as its report shows (Jur. St. 45-46), the Commission also found that no competition between Lynchburg and Danville within the meaning of Section 3 was shown to exist. In any event, the rail carriers presented evidence to the effect that competitive conditions existing at Danville and at Lynchburg differ with respect to competition from natural gas and from other rail carriers and specifically showed that Lynchburg lacks gas supply in the same degree as that of Danville by reason of the denial by the Federal Power Commission of Lynchburg's request for a greater supply of natural gas. See *Lynchburg Gas Company* v. *Federal Power Commission*, 275 F. 2d 847. No effort was made by Appellant to disprove this in the evidence it was permitted to file and actually did file in rebuttal. The evidence before the Commission clearly demonstrated therefore that the fine coal rates to Danville and beyond are designed to meet competitive influences not present at Lynchburg, and it is plain that the circumstances and conditions surrounding the transportation of fine coal to Lynchburg and to such other destinations are therefore dissimilar. As the District Court properly held:

> "This is unquestionably a lawful ground for the difference in rates. On this evidence and the determination that the rates are not otherwise unjust or unreasonable, the Commission has found that there was no preference or prejudice. This conclusion we cannot say is unwarranted in fact or in law. Thus it is binding upon the court. Board of Trade *v.* United States, 314 U. S. 534, 546 (1942)."

One further point may be added. The Commission's findings regarding the alleged violation of Section 3 can also be sustained on the ground that the fine coal rates complained of are the same to Lynchburg as they are to Danville. It is impossible to see how Danville is preferred and Lynchburg prejudiced when they both enjoy exactly the same rates. In other words, even assuming that a receiver in Lynchburg was in competition with a receiver at Danville, it can scarcely be contended that the Danville receiver is preferred over his Lynchburg competitor when both are paying the same rate. The Commission has properly held that no violation of Section 3 occurs under these circumstances. See *American Round Bale Press Co.* v. *A., T. & S. F. Ry. Co.*, 32 I. C. C. 458, 463; *Moline Consumers Co.* v. *Chicago, B. & Q. R. Co.*, 213 I. C. C. 135, 157.

Conclusion.

Since it is evident that the appeal herein presents questions which are neither novel or substantial, it is respectfully submitted that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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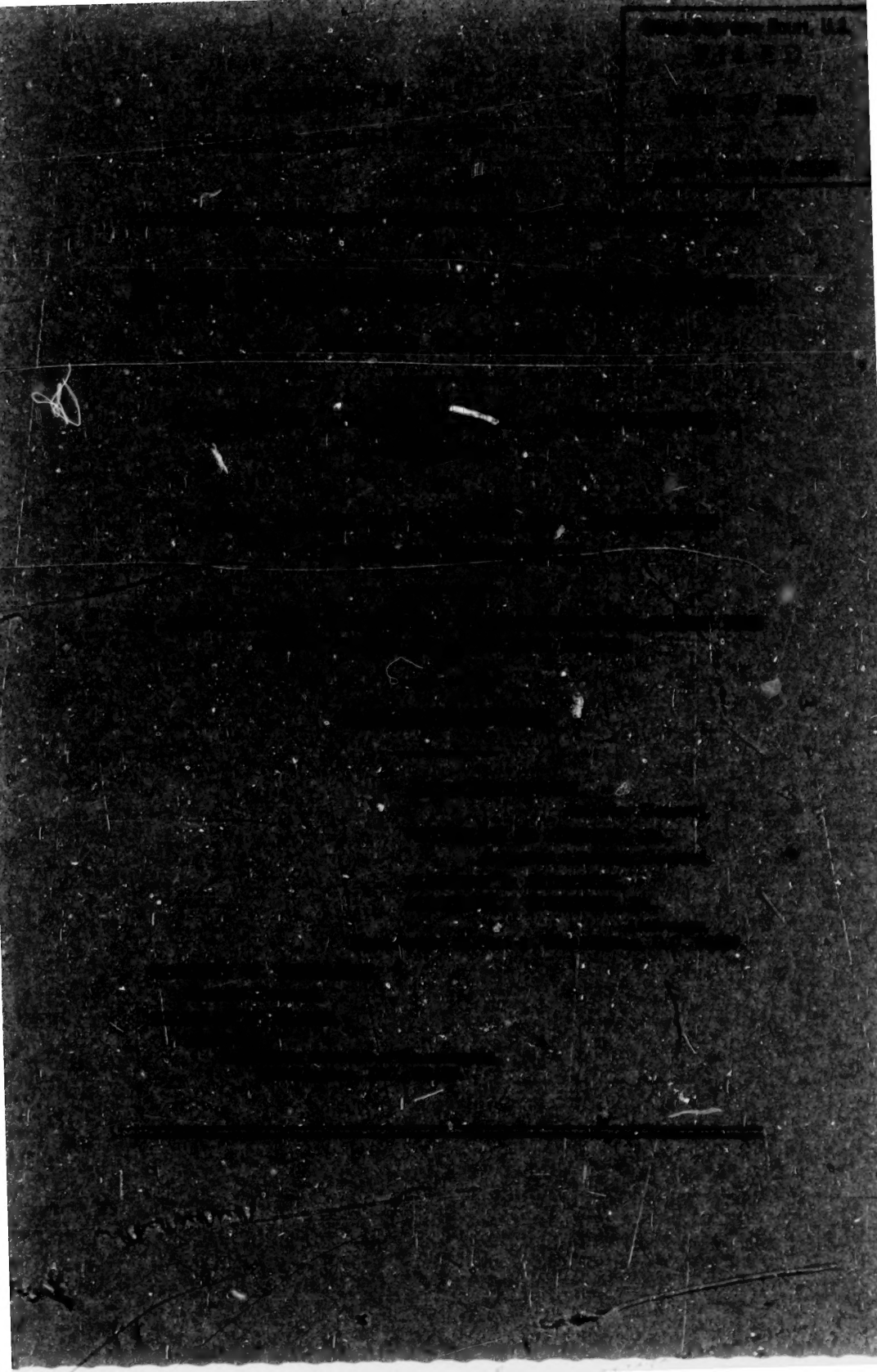

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 931

LYNCHBURG TRAFFIC BUREAU, A CORPORATION, APPELLANT

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c) of the Revised Rules of this Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court, entered on November 21, 1963,[1] dismissing an action brought by appellant to set aside an order of the Interstate Commerce Commission which had dismissed appellant's complaint that

[1] Appellant's motion for reconsideration or rehearing was denied on December 31, 1963 (J.S. 23–24).

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the rates maintained by the respondent railroads on "fine" coal from certain Virginia and West Virginia mines to Lynchburg, Virginia, violate Sections 1, 2, 3(1) and 4 of the Interstate Commerce Act (49 U.S.C. 1, 2, 3(1) and 4) (Appendix, *infra,* pp. 10–11).

In two separate proceedings in 1943 and 1948, the Interstate Commerce Commission prescribed $2.05 and $2.55 respectively as the maximum rates on shipments of bituminous coal from mine groups in Virginia, West Virginia and Kentucky to Lynchburg and Danville, Virginia (J.S. 36). Lynchburg is 64 miles closer to the mines on the main lines of the Norfolk & Western Railway than is Danville (J.S. 34). This 50-cent differential in favor of Lynchburg was increased to 53 cents by subsequently authorized general increases (J.S. 36). In 1954, carriers serving destinations in North and South Carolina determined that competition from natural gas was causing certain consumers of the coal which they carried, particularly electric-utility and other industries, to change their fuel. The carriers decided that a reduction in rates for shipments of fine coal [2] was necessary if they were to retain these customers. They thereupon reduced the rates on fine coal by 35 cents, and, to avoid violations of Section 4,[3] established this reduced rate as

[2] Fine coal, described as "coal which will pass through a bar screen not exceeding one and one-half inches between bars, or its equivalent a two-inch mesh or two-inch round perforation" (J.S. 33), is normally used by industrial consumers, which do not, in contrast, use lump coal. Rates on lump coal are not in issue here.

[3] Section 4, 49 U.S.C. 4 (App., *infra*, p. 11), forbids a carrier to charge or receive greater compensation for a shorter than a longer haul.

the maximum on intermediate points, including Danville (J.S. 40). The rate on fine coal to Danville was then $3.68, and to Lynchburg $3.45, a differential of 23 cents in favor of Lynchburg (J.S. 41).

By subsequent rate changes, including both authorized general increases and reductions necessitated in part by competition among competing rail carriers, this differential in favor of Lynchburg was eliminated and the identical rate of $3.60 was established on fine coal to each locality (J.S. 41–42).

On July 21, 1961, appellant, the Lynchburg Traffic Bureau, filed a complaint with the Commission alleging that this identity of rates on fine coal to localities at different distances from the origin point was (a) unjust and unreasonable, in violation of Section 1 of the Act; (b) unjustly discriminatory, in violation of Section 2; (c) unduly preferential or prejudicial, in violation of Section 3; and (d) in violation of Section 4 (J.S. 33). On May 11, 1962, the Examiner recommended dismissal of the complaint. The Commission, on October 29, 1962, by its Rates and Practices Review Board, entered a report and order (J.S. 31–47) adopting the Examiner's recommendation.[4]

In its report, the Commission considered and rejected each of appellant's contentions. It found that the rate on fine coal from the Virginia and West Virginia mines to Danville, although less than the author-

[4] Appellant's petition for reopening and reconsideration was denied by the Commission, Division 2 acting as an Appellate Division, by order of January 29, 1963. Appellant's petition for reconsideration by the entire Commission was returned as untimely under Rule 1.101 of the Commission's General Rules of Practice.

ized maximum, was not shown to be unjust and unreasonable in violation of Section 1 of the Act (App., *infra*, p. 10). It noted that the railroads were authorized to publish rates less than the established maximum as long as the rates were reasonable, and that the reduction in rates here had been caused, and was justified, by competition between fine coal and natural gas at Danville. It rejected appellant's contention that the Commission had previously determined that a differential of 50 cents in favor of Lynchburg must exist on all bituminous coal rates from the origin mines to Lynchburg and Danville in order for such rates to be reasonable (J.S. 43–44).

The Commission also rejected appellant's contention that identical rates for different distances violated the prohibition of Section 2 of the Act against charging different rates for performing "a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions" (App., *infra*, p. 10). It reasoned that "[t]here can be no unjust discrimination within the meaning of section 2 of the Act when the compared transportation is not from and to the same points," and concluded that "[a]ll receivers of fine coal at Lynchburg are accorded the same rate from the same origins and for the same service, and consequently no discrimination in violation of section 2 is shown by the evidence" (J.S. 44).

Finally, because appellant had failed to present proof of competition between consumers of fine coal at Lynchburg and at Danville, and had not shown that the lowering of the rate to Danville had operated to the

disadvantage of appellant or any receivers of fine coal at Lynchburg, the Commission found that the existence of the same rate to Danville and Lynchburg did not establish that such rates were unduly prejudicial or preferential in violation of Section 3(1) of the Act (J.S. 44–46; App., *infra*, pp. 10–11).[5]

The court below affirmed the Commission on each point (J.S. 26–31).

ARGUMENT

The decision below is clearly correct and this appeal presents no substantial question warranting plenary review by the Court. In essence, appellant's argument is that it is illegal for the railroads to lower the Danville rate on fine coal to a level which equals that applicable at Lynchburg, 64 miles closer to the mines. However, its attempts to show the illegality of such rates under various sections of the Interstate Commerce Act are unavailing.

Appellant first alleges that such rates violate Section 1(5) because, it asserts, the Commission has, in

[5] The allegation of a violation of Section 4 of the Act (the "long and short haul" section) was dismissed by the Commission since the rates were identical at each point and that section only prohibits charging greater rates for a lesser distance, not the same rate for different distances (J.S. 46). At the time the complaint was filed the existing rate on fine coal to Lynchburg had in fact been higher than to Danville (J.S. 42–43). The district court noted that with the equalization of the rates appellant "apparently abandoned" its contentions with respect to Section 4 (J.S. 30; see also J.S. 43).

proceedings dating back to 1900, prescribed lower rates on bituminous coal to Lynchburg than Danville. From that claimed history, appellant argues that the Commission has determined that there must be a fixed rate relationship on all coal favoring Lynchburg by at least 50 cents for such rates to be just and reasonable. However, the Commission found (J.S. 43–44), and the court below affirmed (J.S. 28), that no such relationship had ever been established and that the numerous proceedings of the Commission cited by appellant merely fixed the maximum rates on all bituminous coal for each city. In the absence of any binding relationship, the railroads are free to charge a reasonable rate less than the maximum prescribed (*United States* v. *Chicago, M., St. P. & P.R. Co.*, 294 U.S. 499, 506; *Baltimore & Ohio R. Co.* v. *United States*, 298 U.S. 349, 358). The Commission found (J.S. 44, 46) that the lesser rates at issue here are not unjust and unreasonable, and this determination is properly one of fact to be made by that body (*Pennsylvania R. Co.* v. *International Coal Co.*, 230 U.S. 184, 196; *Lynchburg Traffic Bureau* v. *United States*, 84 F. Supp. 1012, 1016–1017 (W.D. Va.), affirmed, 338 U.S. 864).

The fact that Danville is farther from the mines than Lynchburg, yet enjoys the same rate, is not alone determinative of the reasonableness of the Lynchburg rates, for distance is but one factor in ratemaking. *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 588, 593; *Louisville & N.R.R.* v. *United States*, 238 U.S. 1, 11, 12; *Lynchburg Traffic Bureau* v. *United States*,

supra. Indeed, the Commission found that the railroads were justified in lowering their rate for shipment of fine coal to Danville below the maximum because of the competition at Danville between such coal and natural gas, a competition which did not exist at Lynchburg (J.S. 42–43). The need to adjust rates to meet competition has long been a recognized factor in determining the reasonableness of rates under Section 1(5). *Chicago, M., St. P. & P.R. Co.* v. *United States*, 8 F. Supp. 970, 974 (N.D. Ill.), affirmed *sub nom. United States* v. *Chicago, M., St. P. & P.R. Co., supra*. Thus, the Commission and the court below properly concluded that appellant failed to show in what manner the rate on fine coal at Danville and Lynchburg was unjust or unreasonable in violation of Section 1(5).

Appellant's assertion of unjust discrimination against Lynchburg under Section 2 by reason of the identical rates to Danville is likewise unavailing. Section 2 prohibits discrimination in rates between shippers or receivers of similar commodities for the same transportation service between the same points. Appellant has presented no evidence that the carriers have subjected any shipper or receiver of fine coal either at Lynchburg or at Danville to charges which differ from those paid by other shippers or receivers for the same haul. Such evidence is a prerequisite to a finding of a violation of Section 2 (*Wight* v. *United States*, 167 U.S. 512, 518; *Ayrshire Corp.* v. *United States*, 335 U.S. 573, 584). Complaints concerning the relationship between rates for services to different localities are not cognizable under that sec-

tion (*Interstate Commerce Commission* v. *Western & A.R. Co.*, 88 Fed. 186, 197 (C.C. N.D. Ga.), affirmed, 93 Fed. 83 (C.A. 5), modified on other grounds, 181 U.S. 29).

Finally, appellant claims that the rate on fine coal at Lynchburg is unduly prejudicial to that city, in violation of Section 3(1), because it is the same as that charged for the longer haul to Danville. However, a mere difference or identity in rates does not, without more, amount to an unjust discrimination. *Board of Trade* v. *United States*, 314 U.S. 534, 546. It must be shown that any such discrimination, preference or prejudice is unjust or undue. *United States* v. *Illinois C.R. Co.*, 263 U.S. 515, 524; *Manufacturers R. Co.* v. *United States*, 246 U.S. 457, 481; *Texas, etc. R. Co.* v. *Interstate Commerce Commission*, 162 U.S. 197, 219–220. There must be evidence of competition between consumers of fine coal at Lynchburg and consumers of like coal at Danville, or between the localities themselves, as well as a showing that the disparity operates to the disadvantage of the complainant.[6] *Interstate Commerce Commission* v. *Baltimore & O.R. Co.*, 43 Fed. 37, 47 (C.C. S.D. Ohio), affirmed, 145 U.S. 263, 283–284; *Atchison, T. & S.F.R. Co.* v. *United States*, 218 F. Supp. 359, 369 (N.D. Ill.). Appellant failed to introduce any such evidence and the compe-

[6] Appellant supports its argument that there is actual competition between Lynchburg and Danville by citation of the Commission's decision in 1900 in *City of Danville* v. *Southern Railway*, 8 I.C.C. 409 (J.S. 9–10). Whatever that decision may indicate as to the existence of competition between the cities in 1900, it does not constitute evidence of that fact as of the date of appellant's complaint.

tition between fine coal and natural gas at Danville,[*] was held by the Commission to be justification for the lowering of the rate for fine coal there (J.S. 39, 40, 46).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the district court should be affirmed.

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APRIL 1964.

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[*] This competition did not exist at Lynchburg, since that locality does not have the same gas supply available to it as does Danville; the Federal Power Commission denied the local gas company's request for a greater supply of natural gas. See *Lynchburg Gas Company* v. *Federal Power Commission*, 275 F. 2d 847 (C.A. 3).

Appellant argues that the record is "absolutely void of any evidence" of competition between fine coal and natural gas at Danville (J.S. 13–15). This contention is refuted by the findings of both the Commission (J.S. 46) and the court (J.S. 30). Thus, the Commission stated, "the defendants have shown, without contradiction, that the present rates on fine coal to Danville are compelled by gas competition * * *."

APPENDIX

The pertinent provisions of the Interstate Commerce Act, 49 U.S.C. 1 *et seq.*, are as follows:

1. Section 1(5):

All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof is prohibited and declared to be unlawful.

2. Section 2:

If any common carrier subject to the provisions of this part shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property, subject to the provisions of this part, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is hereby prohibited and declared to be unlawful.

3. Section 3(1):

It shall be unlawful for any common carrier subject to the provisions of this part to

make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: Provided, however, That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

4. Section 4(1):

It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance * * *.

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1963

Case No. 931.

LYNCHBURG TRAFFIC BUREAU (Corp.)
Appellant,

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Appellees.

On Appeal From The United States District Court For The Western District of Virginia.

REPLY BRIEF OF APPELLANT TO MOTION TO AFFIRM

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STATEMENT

It should be borne in mind that appellant is not concerned with the level of the rates as such on fine coal to Danville and Lynchburg, but rather appellant is here concerned with the relationship in the rates between Lynchburg and Danville. In other words, regardless of the scale or level of rates used at Danville, the rate to Lynchburg became unlawful when that rate is not at least 53 cents a ton less than the rate to Danville. The amount of the re-

lationship is 53 cents a ton which was the difference in the rate to Danville and the rate to Lynchburg on fine coal prior to the date the Danville rate was first reduced, in 1954. The record shows that appellant is seeking the restoration of the former relationship as it is stated in the record that:

> "The complainant seeks a rate on fine coal from the base group to Lynchburg of $3.07 or 53 cents lower than the rate on the same commodity to Danville." (Jur. S. p. 35)

The 53 cents figure is the difference between the rate on fine coal to Danville of $4.35 and to Lynchburg of $3.82 per ton in effect at the time the reduction was made to Danville (Jur. S. p. 35). The aforesaid difference was fixed by the Commission when it prescribed a rate of 205 cents per ton to Lynchburg in *Ashland Coal and Ice* v. *A.C.L.*, 256 I.C.C. 429, and prescribed a rate of 255 cents a ton to Danville in *Danville Chamber of Commerce* v. *Southern Railway*, 191 I.C.C. 20 (Jur. S. p. 5). Since Lynchburg, for over 60 years, has been lawfully, in accordance with various decisions of the Commission, entitled to a lower rate than Danville, it is unlawful to charge a rate at Lynchburg on fine coal which is not 53 cents a ton less than the rate to Danville, regardless of the level of the rate to Danville or the cause for the establishment of the reduced rates to Danville. The cause for the reduced rate to Danville may or may not be to meet competition with other fuels but the fact remains that a disturbance of the rate relationship between Danville and Lynchburg, which has existed for 60 years, will do irreparable damage to Lynchburg and place Danville in a better competitive position, a competitive position its geographical location does not entitle Danville to enjoy over Lynchburg.

The Commission has concerned itself with the alleged right of appellee carriers to fix their own rates to meet competition and the inability of the Commission to do anything about it. The main issue here and before the Commission is not the level of the rate themselves, but rather the lawfulness of destroying the rate relationship between Danville and Lynchburg.

The Commission, in dealing with the relationship in rates, stated:

> "While the Lynchburg rate and the distance for which it applied were considered by the Commission in prescribing the rate to Danville, no specific relationship between bituminous coal rates to Lynchburg and to Danville was prescribed or required by the Commission in the Carolina Coal Consumer's Case supra, nor has any specific relationship in the rates on either fine or lump coal to Lynchburg and Danville been prescribed in any other proceeding." (Jur. S. 43-44)

This conclusion of the relationship by the Commission is incorrect in fact, even though it may or may not be technically correct, as the Commission actually prescribed a rate of 50 cents less on fine coal to Lynchburg than the rate on fine coal prescribed to Danville. The difference of 50 cents in the rate to Danville and Lynchburg was actually prescribed regardless of the name by which the difference is called. (Jur. S. p. 5). See *Ashland Case supra*, 256 I.C.C. 429, and *Carolina Case*, 270 I.C.C. 291.

The relationship was actually prescribed in and the difference in the prescribed rates to Lynchburg and Danville was again affirmed in *Carolina Coal Consumers Con-*

ference v. *A. & R.*, 270 I.C.C. 291, when the Commission said:

> "Upon consideration of the traffic and transportation conditions in the respective areas (which includes Lynchburg) and of the needs of shippers and consumers concerned, as well as the revenue needs of the carriers, we are convinced that the difference in the rate levels referred to (including the rate level to Lynchburg, page 318) IS TOO GREAT AND THAT A REDUCTION IN THE ASSAILED RATES GENERALLY TO THE EASTERN AND western portions of the Carolinas; to Augusta area, and to Danville and Riddle, is warranted." (Jur. S. p. 12). (Emphasis added)

The report of the Commission in the Carolina Case supra shows that a different rate at Lynchburg from the rate to Danville is justified based on the transportation conditions in the respective areas (Lynchburg and Danville), the needs of the shippers as well as the revenue needs of carriers. Therefore the same rate at Lynchburg as at Danville is discriminatory against Lynchburg as well as being unjust and unreasonable. This showing of appellant establishes the fact that undue preference exists at Danville and unjust discrimination exists at Lynchburg. The above showing establishes the existence of discrimination when measured by the decision of the Supreme Court in *New York* v. *United States*, 331 U.S. 284 where at page 365 the Court stated the following:

> "Hence we must determine from the preexisting law whether a discrimination against a territory is obnoxious to Section 3. The rule is stated in *United States* v.

Illinois R., supra, (263 U.S., p. 524, 68 L. Ed. 425, 44 S. Ct. 189), as follows:

> "To bring a difference in rates within the prohibition of Section 3, it must be shown that the discrimination practiced is unjust measured by the transportation standard. In other words, the difference in rates cannot be held illegal unless it is shown that it is not justified by the cost of the respective services, by their values, or by other transportation conditions.'"

The above decision of this Court clearly shows that competition between fine coal and natural gas at Danville is no grounds for the establishment of discriminatory rates at Lynchburg or the destruction of a relationship in rates between Lynchburg and Danville that has existed for over 60 years. The same rate at Lynchburg and Danville is not justified by the cost of the respective services, by their value or by other transportation conditions.

The reply will show that there is no merit to the motion to affirm.

RATE AGAINST PARITY

There is nothing in the Interstate Commerce Act, as amended, that affords the sligltest warrant for the decision of the Commission holding that Lynchburg and Danville must be treated legally identical as to rates on fine coal, but there is a definite prohibition in the Interstate Commerce Act against such rates being equal. The Commission has, for over 60 years in performing its duties under the Act, recognized that different rates at Lynchburg and Danville are justified and that such difference in rates are justified

by the differences in distances, the transportation conditions, and cost of rendering services to Lynchburg and to Danville. (See *City of Danville* v. *Southern Railway* 8 I.C.C. 409 (decided 1900) and 34 I.C.C. 430; Bituminous Coal to southeast 37 I.C.C. 652; and other decisions reported at 256 I.C.C. 429; 270 I.C.C. 291, 191 I.C.C. 20; 213 I.C.C. 101; 190 I.C.C. 325 and 190 I.C.C. 302.) In each of these decisions the Commission fixed a difference in the rates to Lynchburg from the rates it fixed to Danville and in so doing recognized the fact that Lynchburg is lawfully entitled to a lower rate than Danville.

In the City of Danville case 8 I.C.C. 409 and the *City of Danville case* 34 I.C.C. 430, the allegation was that the rates on coal then in effect caused unjust discrimination against Danville and undue preference to Lynchburg. The discrimination and preference was found to exist by the Commission and the Commission removed the discrimination by prescribing reasonable, just and otherwise lawful rates to Danville and in so doing fixed a higher rate at Danville than the rate applicable at Lynchburg. This prescribed parity in rates between Lynchburg and Danville on coal continued in effect from 1900 to 1954 on which date the appellee carriers began destroying the parity. Consequently, finding the rate to Danville not shown unlawful when applied at Lynchburg creates discrimination against Lynchburg and establishes preferential rates at Danville which discrimination is prohibited by law and defeats the purpose for which the Commission was created—to prevent the creation of DISCRIMINATION. The Commission and the carriers contend that these unlawful rates are justified by competition at Danville between fine coal and natural gas.

The former decisions of the Commission finding that different rates should apply on coal to Lynchburg and Danville

establishes, as a fact, that the rate applicable to Danville when applied at Lynchburg is unlawful at Lynchburg.

In fact the Commission so found that Lynchburg is entitled to lower class rates than Danville and this Court sustained the Commission in Class Rate Investigation 1939, 262 I.C.C. 447 (pp. 619, 610) (331 U.S. 284) where the Commission stated that:

> "Nearness to markets and ability to ship to markets, on a basis fairly and reasonably related to the rates of competitors, are nevertheless potent factors, in the location of a manufacturing plant. IN FACT, RATE RELATIONS ARE MORE IMPORTANT TO THE MANUFACTURER AND SHIPPER THAN THE LEVELS OF THE RATES." (Emphasis added)

In the decision of the Commission in Class Rate Investigation 262 I.C.C. 447 the Commission prescribed a class rate of 4 cents a 100 pounds or 80 cents a ton less to Lynchburg than to Danville from the origin here involved which class rate would apply on coal in the absence of a commodity rate on coal. (Jur. S. p. 37). The Supreme Court in *New York* v. *U.S.*, 331 U.S. 284 affirmed the decision of the Commission in 262 I.C.C. 447. Hence, the Danville rate when applied at Lynchburg results in unlawful rates at Lynchburg based on the decisions of the Commission prescribing rates on coal to Danville and Lynchburg and based on the decision of the Commission in the Class Rate case 262 I.C.C. 447 which rates were affirmed by this Court.

The Danville rates on fine coal when applied at Lynchburg destroys the parity in rates between Danville and Lynch-

burg which the Interstate Commerce Commission fixed over 60 years ago and the destruction of the parity is sought to be made upon an unsupported claim that there is competition at Danville between fine coal and natural gas. The alleged competition at Danville is not shown in the record. There is a substantial question involved in this case which warrants the overruling of the Motion to Affirm and the taking of jurisdiction by this Court.

DISCRIMINATION

The record shows that Lynchburg and each point used in the comparisons have Chambers of Commerce which compete with one another in efforts to attract new and retaining existing industries, that each such City requires just, reasonable, and otherwise lawful rates on a basic raw material such as fine coal to permit its development and growth, that Lynchburg by reason of its relatively higher rates, distance considered is in an unfavorable competitive position compared with Danville, Winston Salem, Greensboro and Durham (Jur. S. p. 38).

In answer to the positive evidence of appellant showing that each point named are competitive, the Commission answered by saying that:

> "Complainant has failed to show that there is competition between CONSUMERS OF FINE COAL AT LYNCHBURG AND CONSUMERS OF FINE COAL AT DANVILLE, or that the rate adjustment has operated to the disadvantage of the COMPLAINANT or ANY RECEIVER OF COAL THERE LOCATED. On the other hand, the defendants have shown without contradiction, that the present rates

> on fine coal to Danville are compelled by gas competition, and that this competitive factor is not compelling at Lynchburg" (Jur. S. pp. 45, 46). (Emphasis added)

The record fails to show that the reductions to Danville were made to meet competition between fine coal and natural gas (Jur. S. pp. 40 and 41) and the said report of the Commission is contrary to facts of record.

The decision of the Commission required appellant to show that there is competition between CONSUMERS OF FINE COAL AT LYNCHBURG AND CONSUMERS OF FINE COAL AT DANVILLE and for that reason, the failure to so show the complaint was dismissed. The dismissal of the complaint on that ground is contrary to a decision of this Honorable Court holding that:

> "An unlawful discrimination against regions or territories in the matter of freight rates charged IS NOT DEPENDENT ON A SHOWING OF UNLAWFUL DISCRIMINATION AGAINST INDIVIDUAL SHIPPERS, since the effect of discriminatory rates is not only to impede established industries but to prevent the establishment of new ones, to arrest the development of a state or region; and to make it difficult for an agricultural economy to evolve into an industrial one." State of New York v. U.S. 67 S. Ct. 1207, 331 U.S. 284, 91 L. Ed. 1492. (Emphasis added)

The record shows that the evidence of appellant before the Commission met the required proof to establish discrimination as set forth in *New York* v. *U.S.*, 331 U.S. 284 (See Jur. S. p. 38). THE PROOF OF APPELLANT RELATED TO SHOWING THE DISCRIMINATION

AGAINST LYNCHBURG AND THIS COMMUNITY RATHER THAN DISCRIMINATION AGAINST INDIVIDUAL RECEIVERS OF COAL. No actual receiver of coal was named in the complaint.

A LICENSE

The appellee, United States and the Interstate Commerce Commission, contends that:

> "The need to adjust rates to meet competition has long been a recognized factor in determining the reasonableness of rates under Section 1(5)." (Their Motion p. 7)

The appellee rail carriers contends that:

> "The rail carriers, in order to retain this important traffic, frequently find it desirable to reduce their rates on fine coal to a level below those applicable on lump coal in circumstances where the industrial users of fine coal are in a position to substitute the use of oil or natural gas." (Their Motion p. 3)

Then the Commission stated that:

> "Under Section 1 of the Act, the railroads are entitled to publish and charge reasonable, maximum rates. So long as the railroads do not go below the minimum limit of reasonableness, they may voluntarily publish rates which do not attain the maximum, but the Commission cannot, under Section 1 alone, require them to do this." (Jur. S. p. 43)

This conclusion of appellees is contrary to the holding of this Court that:

> "Proposed interstate rates may be within the zone of reasonableness and yet result in undue prejudice or otherwise violate this title." (49 U.S.C. 1 and 3) *Interstate Commerce Commission* v. *Inland Waterways Corp.*, Ill. 1943, 63 S. Ct. 1296, 319 U.S. 671, 87 L. Ed. 1655.

Furthermore, this Honorable Court has held that:

> "The Interstate Commerce Commission may remove a discrimination effected by rates charged by railroads even when they are within the zone of reasonableness, if the discrimination is forbidden by this paragraph." (49 U.S.C. 3) *State of New York* v. *U.S.*, 331 U.S. 284.

It is clear from the above that the decision of the Commission in this proceeding is contrary to decisions of this Court holding that the Commission may remove unlawful rates even though they fall within a zone of reasonableness.

One of the inconsistencies is that the Commission held that the rate applicable to Danville is not shown to be unjust or unreasonable or otherwise unlawful when applied at Lynchburg. This holding is violative of Section 4 of Title 49 U.S.C. as the appellee carriers cannot charge more at Lynchburg than at Danville until they obtain relief from the Interstate Commerce Commission authorizing the carriers to depart from the provisions of Section 4 of the Act. No such authorization was granted. Therefore, charging the Danville rate at Lynchburg is contrary to Section 5 which provides that it:

> "Shall not be construed as authorizing any common carrier within the terms of this part to charge or receive as great compensation for a shorter as for a longer distance."

Consequently, there is no sanction in law for the action of the Commission in finding that the assailed rates are not shown to be unjust, unreasonable, unjustly discriminatory, unduly prejudicial, or violative of Section 4 of the Act, when, as here, the assailed rate is unlawful under Section 4 of the Act.

The decision of the Commission holding that APPELLEE CARRIERS ARE AT LIBERTY to adjust their rates so long as the railroad does not go below the minimum limit or reasonableness or attain the maximum and that the Commission cannot under Section 1 alone require them to do this, is a holding contrary to Sections 3 and 4 of the Act as well as repugnant to Section 1 of the Act.

This decision gives the rail carriers a license to violate the Act with impunity at their pleasure. The Interstate Commerce Act does not give the Commission the authority to license a rail carrier to build up one community with favorable rates and destroy another community by unfavorable rates. Consequently, the appeal presents substantial question for determination by this Honorable Court.

COMPETITION

A finding that competition exists at Danville between fine coal and natural gas is a finding of competition that does not exist, based on the record. Consequently, such a finding by the Commission presents a substantial question requiring action by this Honorable Court.

The appellees, United States and the Interstate Commerce Commission, at sheet 7 of their Motion, state:

> "Indeed, the Commission found that the railroads were justified in lowering their rate for shipments of fine coal to Danville below the maximum because of the competition at Danville between said coal and natural gas, a competition which did not exist at Lynchburg."
>
> Does the record actually support appellees in their contention that the reduction at Danville was made to meet actual competition at Danville between fine coal and natural gas? The record does not support such a finding and the Motion to Affirm must be overruled.

The record before the Commission shows by a witness for defendant carriers that the FIRST REDUCTION TO DANVILLE was made in 1954 to SATISFY THE PROVISIONS OF SECTION 4 OF TITLE 49 U.S.C. AS DEFENDANT CARRIERS HAD REDUCED THE RATE TO points in North Carolina which resulted in higher rates at Danville than at points in North Carolina and the reduction at Danville was made to remove fourth section departures, Jur. S. p. 40. The SECOND REDUCTION at Danville was NOT MADE for competitive reasons, BUT BECAUSE THE SOUTHERN RAILWAY REDUCED THE RATE TO DANVILLE FROM CERTAIN MINES ON THE INTERSTATE RAILROAD. The reductions these carriers made on July 10, 1958 to points in North Carolina were not made applicable at Danville as Fourth Section Order No. 18957 issued on July 9, 1958 authorizing the appellee carriers to charge more at Danville than at a more distant North Carolina point (Jur. S. p. 41). It is significant to observe that if the reduction in 1958 to Danville was made as contended by appellee, to meet

competition between fine coal and natural gas at Danville, then it was not necesary to obtain Fourth Section relief, as was done in order to charge the former rate at Danville. The third reduction was made on April 29, 1959 by all the carriers to all points in southern Virginia and North Carolina (Jur. S. p. 41). The reduction to Danville was not made to meet competition between fine coal and natural gas.

The record before the Commission does not sustain the Commission or the rail carriers that competition at Danville between fine coal and natural gas required the establishment of the reduced rates on coal. The report of the Commission is therefore unsupported by substantial evidence and that fact presents a substantial question requiring action by this Court.

CONCLUSION

The fact, if it was true which it is not, that there is competition at Danville between fine coal and natural gas, still that competition does not give the appellee carriers the right to establish rates which do irreparable damage to Lynchburg nor does the Interstate Commerce Act authorize the Commission to permit discriminatory rates to continue in effect. The record, since 1900, shows that Danville and Lynchburg are in competition with each other and, due to that competition, the Commission has prescribed different rates on coal to Lynchburg and Danville. The difference in the rates was 53 cents a ton at the time the preferential rates were published to Danville. Consequently, a disturbance of that relationship is the creation of unlawful rates at Lynchburg. When the rate to Danville was made applicable at Lynchburg and when a higher rate at Lynchburg than at Danville was in effect, the rate to Lynchburg became

discriminatory at Lynchburg, under prior findings of unreasonableness, became entitled to a rate of 53 cents a ton less than the rate to Danville.

The relief here sought should be granted and the motion to affirm should be overruled. Appellant so prays.

Respectfully submitted,

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May 7, 1964

PROOF OF SERVICE

I, W. G. Burnette, attorney for Appellant, hereby certify that I have this 6 day of May, 1964, served a copy of the foregoing document upon the Appellees by mailing a copy thereof to:

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The Solicitor General, Department of Justice, Washington 25, D. C.

John H. D. Wigger, Esq., Attorney, Department of Justice, Washington 25, D. C.

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In The

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v.

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INTERSTATE COMMERCE COMMISSION,
Appellees.

PETITION OF APPELLANT FOR REHEARING

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PETITION OF APPELLANT FOR REHEARING

Comes now appellant under Rule 58, Rules of the Supreme Court of the United States and file this petition for a rehearing by this Court of cause and then for the Court to grant the relief sought. In support thereof appellant respectfully shows as follows:

THE FIRST POINT

This is an action to set aside an order and report of a three judge district court affirming an order and report of the Interstate Commerce Commission issued in Docket

33831 holding that the rate to Danville on coal of 360 cents a ton when applied at Lynchburg does not result in an unjust or unreasonable rate at Lynchburg. The holding is contrary to former decisions of the Commission finding that a reasonable and just rate is a rate made 50 cents a ton lower to Lynchburg than to Danville. A complaint was filed with the Commission because (a) the rail carriers established a carload rate on fine coal of 360 cents a ton in lieu of a rate of 435 cents a ton from mines on the lines of said rail carriers to Danville, Virginia, a point more distant from the said mines by 67 miles than Lynchburg and (b) they continued in effect a rate of 382 cents a ton to Lynchburg until a rate of 360 cents was established at Lynchburg and then refused to reestablish the former relationship of 50 cents a ton in rates between Danville and Lynchburg. The action of the rail carriers in establishing a rate of 360 cents a ton applicable through Lynchburg to Danville to take the place of a rate of 435 cents a ton, and continuing the rate of 382 cents a ton to Lynchburg until the rate to Danville of 360 cents a ton was made effective at Lynchburg, Virginia, placed Lynchburg, then and now, at an unnatural disadvantage resulting in unlawful rates at Lynchburg. The Commission dismissed the complaint and a three judge district court upheld the Commission. This Court granted the motion to affirm. Both decisions are wrong as will appear from the record.

The Interstate Commerce Commission has, since 1900, prescribed lower rates on coal to Lynchburg than it prescribed to Danville. This fact is borne out by two decisions of the Commission. The first is Ashland Coal and Ice v. A.C.L. 256 I.C.C. 429 (decided in 1943) where a rate of 205 cents a ton was prescribed to Lynchburg for a distance

of 195 miles which was subsequently increased to 382 cents and the second case is Danville Chamber of Commerce v. Southern Railway 191 I.C.C. 20, where the Commission prescribed a rate of 255 cents a ton to Danville for a distance of 271 miles via Lynchburg which was subsequently increased to 435 cents. It is thus clear that the Commission, pursuant to the Interstate Commerce Act, has fixed, since 1943, a rate relationship of 50 cents a ton lower to Lynchburg than to Danville and that the said 50 cents a ton difference in the rates reflected the difference in cost of rendering transportation service to Lynchburg and Danville. Therefore, regardless of what the rate to Danville may be or the cause for the establishment of the rate of 360 cents to Danville, those things cannot justify the same rate at Lynchburg and Danville as the Commission has prescribed a different rate for Lynchburg and Danville. The difference in transportation conditions in the movement of coal to Danville and Lynchburg justifies a rate of 50 cents a ton lower to Lynchburg than to Danville, and the Commission has so held. That difference can only be changed based upon evidence of the rail carriers showing that the cost and transportation conditions are the same to Lynchburg and Danville. There is no evidence of record showing that the transportation conditions are the same to Lynchburg and Danville; hence, the same rate to Lynchburg as to Danville is not a reasonable and just rate to Lynchburg. Therefore, the decision of the Commission in this proceeding holding that the rate to Danville is proper at Lynchburg is not supported by any evidence. This Honorable Court is respectfully requested to correct the aforesaid wrong.

The rail carriers defended the charging of the same rate at Lynchburg and Danville on the ground, among

others, that the rate of 360 cents to Danville was established to meet competition between fine coal and natural gas at Danville. The evidence does not support such a contention as the evidence does not show any actual or potential competition at Danville between fine coal and natural gas. Assuming that there is competition at Danville between fine coal and natural gas, still that fact alone, even if true, dose not warrant or justify the destruction of the relationship of 50 cents a ton the Commission fixed between Danville and Lynchburg. In order to change that difference in rates or in the relationship, the record must show affirmatively that the said destruction of the 50 cents differential resulting in the same rates to both points is justified not because of competition between two fuels but because the transportation conditions justify the same rate to both points. The record does not show that the cost of rendering service to Danville and Lynchburg is the same. Consequently, the decision is unsupported by evidence. In fact, Congress directed the Commission in Section 15a(2) 49 U.S.C. 15a(2) as follows:

> "(2) In the exercise of its power to prescribe just and reasonable rates the Commission shall give due consideration, among other factors, to the effect of rates on the movement of traffic by the carrier or carriers for which the rates are prescribed; to the need, in the public interest, of adequate and efficient railway transportation service at the lowest cost consistent with the furnishing of such service; and to the need of revenues sufficient to enable the carriers, under honest, economical, and efficient management to provide such service."

In this proceeding, the Commission ignored all of the above requirements in passing upon the lawfulness of the assailed rate to Lynchburg. The Commission gave only consideration to the proposition of whether the defendant carriers could reduce the rate to Danville to meet alleged competition between fine coal and natural gas. The Commission did not give proper consideration to its former decision holding that a difference in rates of 50 cents a ton is justified by a difference in transportation conditions between the two points when the Commission considered the lawfulness of applying the same rates at Lynchburg and Danville. The rail carriers may meet competition provided in meeting it the rates established do not violate other provisions of the Act. Here the reduced rate to Danville does violate the Act as the Commission has prescribed a rate to Lynchburg made 50 cents a ton less than the rate prescribed to Danville.

The Interstate Commerce Act provides that all charges made for any service rendered or to be rendered in the transportation of property *shall* be just and reasonable and every unjust and unreasonable charge is prohibited and declared to be unlawful (49 U.S.C. 1(5)). The Commission, pursuant to that section, prescribed in 1943 as a just and reasonable rate to Lynchburg a rate of 50 cents lower than the rate the Commission prescribed to Danville, and the difference in the rates is justified based upon a difference in the cost of rendering transportation service to Lynchburg and Danville. The difference in rates of 50 cents a ton cannot be destroyed unless there is evidence of record showing that the cost of rendering the service is the same to Lynchburg for 195 miles as it is to Danville for 271 miles. There is no evidence supporting the proposition that the cost in rendering the service is the same to Lynch-

burg as it is to Danville. Consequently, there is no evidence of record here to support a finding that a rate of 360 cents to Lynchburg is not unjust or unreasonable in view of the former decisions of the Commission and the difference in transportation conditions between Danville and Lynchburg.

The evidence shows that the rate to Lynchburg must be at least 50 cents a ton lower than the rate is to Danville and in the absence of affirmative evidence showing that Lynchburg is not entitled to a rate made 50 cents a ton less than the rate to Danville, the report and order of the Commission must be set aside as being contrary to the evidence.

Section 1(5) of the Act 49 U.S.C. 1(5), requires, regardless of whether the competition is justified or not or whether the Fourth Section departures are authorized or not authorized, that all charges be just and reasonable. It is the contention of appellant that the Commission is bound by its former decisions which were *based on evidence of record* in those decisions showing the transportation costs and conditions in transporting coal to Lynchburg and Danville are different and that the difference in costs and transportation conditions justifies a rate of 50 cents a ton lower to Lynchburg than the rate is to Danville. There is no evidence of record here showing that the transportation conditions and the cost of rendering the service to Lynchburg and Danville are the same to Lynchburg as they are to Danville and in the absence of such evidence, the former decision of the Commission prescribing a difference of 50 cents a ton must stand. These facts from the record, appellant believes, are sufficient to justify the granting of this petition and they clearly establish the fact that the report and order are not supported by evidence.

In other words, the record here shows that the order and report of the Commission, if permitted to stand, means that the Commission itself is forcing Lynchburg to purchase transportation service on coal on a higher mile for mile level of rates than the mile for mile level of rates the Commission permits Danville to purchase transportation service on fine coal. This conclusion is obvious from the record as the prior report of the Commission shows that the rates must be 50 cents a ton lower to Lynchburg than to Danville because of the difference in distance and transportation conditions existing between the two points. In this proceeding the Commission is holding that the same rate on coal to Danville and Lynchburg does not make the Danville rate when applied at Lynchburg unjust and unreasonable at Lynchburg. Congress did not intend that the Act should be administered so as to permit one community to purchase transportation service on the same commodity on a more favorable term than another community can purchase such service.

THE SECOND POINT

The motion to affirm should have been denied. The reason appellant believes the motion should have been denied is that it is provided in 28 U.S.C. 1253 that any party may appeal a decision of a three judge court to the Supreme Court from an order granting or denying an interlocutory or permanent injunction in any civil action, suit, or proceeding required by an Act of Congress to be heard and determined by a district court of three judges. The statute quoted, appellant believes, creates as a matter of right, the right to be fully heard on appeal by this Honorable Court to the same extent as that right is allowed from a district court to a court of appeals.

This action is one that Congress provided should be heard by a three judge district court, 28 U.S.C. 2325 and under 28 U.S.C. 1253, a direct appeal to the Supreme Court is permitted. It would seem that this Court should not have granted the motion to affirm filed by appellees, but rather should have overruled the motion. In support thereof, attention is directed to the provisions of 28 U.S.C. 2284 and 2325 allowing appellant the right to appeal the decision of the Commission to a court of three judges and for that court to hear and determine after hearing whether or not the order and report of the Commission should be enjoined and set aside. It is felt since an appeal is allowed as a matter of right in civil case from a district court to a court of appeals, that the same right should be allowed from a district court of three judges to the Supreme Court.

Attention is also directed to Amendment One of the Constitution of the United States which provides that:

> "Congress shall make no law respecting the right of the people to petition the government for a redress of grievance."

Appellant here petitioned the government for redress of the wrong the rail carriers committed against appellant by charging the same rate on coal at Lynchburg as they charge at Danville, when the Interstate Commerce Commission, a branch of the government, previously had found from evidence based on costs of rendering service and distances that Lynchburg is lawfully entitled to a rate on coal made 50 cents a ton below the rate to Danville. The redress was denied and that denial was wrong as the Commission had already fixed a difference of 50 cents a ton in the rates on

coal between Lynchburg and Danville. The Commission justified the charging of the same rate at Lynchburg as at Danville on the premises that the rail carriers had a right to show preference to Danville in rates on coal on an alleged theory that natural gas and fine coal were competitive at Danville. The existence of the competition was not established by evidence nor was the destruction of the aforesaid differential of 50 cents a ton justified by any valid transportation conditions or reasons. The evidence of record shows that the Commission in its former decision had found that a difference of 50 cents a ton should exist between the rate to Lynchburg and the rate to Danville and it was a substantial error for the Commission to disregard its prior finding which was based on evidence that justified a difference of 50 cents a ton in the rates and to hold here without any evidence to justify the destruction of the difference of 50 cents a ton that the rate to Danville when applied at Lynchburg is not unjust or unreasonable.

CONCLUSION

It is the position of appellant that Amendment One to the Constitution contemplates a full hearing before this Court on the merits of the grievances and the granting of this petition is directed to the sound discretion of this Court rather than being directed to technical rules and past decisions. Appellant for the above reasons believes that this Honorable Court should take jurisdiction of this appeal and determine whether or not the Commission can disregard its former decision in the absence of evidence to support its disregard of these decisions and determine all

issues raised. Appellant believes that the appeal should be allowed and the relief sought granted.

Respectfully submitted.

LYNCHBURG TRAFFIC BUREAU
By: W. G. BURNETTE, *Attorney*

W. G. BURNETTE
1017 Church Street
Lynchburg, Virginia

June 18, 1964

CERTIFICATE OF SERVICE

I, W. G. Burnette, attorney for Appellant, hereby certify that I have this 18 day of June, 1964, served a copy of the foregoing document upon the Appellees by mailing a copy thereof to:

Thomas B. Mason, Esq., United States Attorney for Western District of Virginia, Room ....., Federal Building, Lynchburg, Virginia.

The Solicitor General, Department of Justice, Washington 25, D. C.

John H. D. Wigger, Esq., Attorney, Department of Justice, Washington 25, D. C.

William H. Orrick, Jr., Esq. Asst. Attorney General, Washington 25, D. C.

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